BENCH MEMORANDUM

TO: Judge Boal

FROM: Charlotte Weiss

DATE: 2/28/2023

RE: Proposed report and recommendation ("R&R") on Defendant's motion to dismiss for lack of Sherman Act standing and under 12(b)(6).

I. FACTUAL AND PROCEDURAL HISTORY[1]

Defendant is a corporation. Plaintiff is a former employee of Defendant. Plaintiff signed an employment agreement with Defendant which included a limitation on disclosing confidential information and/or trade secrets.

Plaintiff subsequently resigned from Defendant. Since his departure, Plaintiff has been unable to secure work, and he has been unsuccessful in his attempts to obtain letters of reference or personnel evaluations from Defendant. One organization, Company X, to which Plaintiff applied informed him that the individuals he provided as references at Defendant did not respond to Company X's requests for information.

Plaintiff filed pro se a complaint alleging violations of the Sherman Act. In the complaint, Plaintiff alleges that his employment agreement is unlawful under antitrust laws. Specifically, he argues that the agreement is too broad without any temporal or geographic limitation. Plaintiff

[1] Because this case is presently before this Court on a motion to dismiss, I set forth the facts taking as true all well-pleaded allegations in the complaint and drawing all reasonable inferences in Plaintiff's favor. See Morales-Tañon v. P.R. Elec. Power Auth., 524 F.3d 15, 17 (1st Cir. 2008).

also asserts that the agreement does not define the information to which he was exposed that would allow him to break Defendant's confidentiality or otherwise develop something that presented an unfair business interest. The above components, Plaintiff asserts, result in an overly restrictive contract.

Plaintiff also appears to allege that Defendant has entered, formally or informally, into a "no-poach" agreement with competitors to unnecessarily restrain his employment mobility. Plaintiff acknowledges that he is not personally aware of any "no-poach" agreement, but he seems to assert that such an agreement can be implied from Defendant's refusal to provide him with a reference.

Defendant filed the instant motion to dismiss.

II. ANALYSIS

Defendant contends that Plaintiff does not have antitrust standing, nor has he stated a claim under section 1 of the Sherman Act.

1. Private Right Of Action

Pursuant to section 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The Sherman Act does not provide a private right of action. See id. However, the Clayton Act provides in relevant part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). The Clayton Act further provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust

laws." Id. § 26. Because Plaintiff is proceeding pro se, I suggest construing his claim as one brought pursuant to the Clayton Act.[2]

2. Antitrust Standing

Before assessing the merits of the underlying claim, a court must determine whether the plaintiff has standing to proceed. See Donovan v. Digit. Equip. Corp., 883 F. Supp. 775, 781 (D.N.H. 1994). In an antitrust case, a plaintiff must establish both constitutional standing and antitrust standing. In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016). The purpose of the antitrust standing doctrine is "to avoid overdeterrence" and to "ensure that suits inapposite to the goals of the antitrust laws are not litigated and that persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability." Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999) (citations and quotation marks omitted). "To further this purpose, we seek to ensure that the prospective antitrust plaintiff has suffered an injury of the kind antitrust laws were intended to prevent, such that the plaintiff is a proper party to bring a federal antitrust suit." Vazquez-Ramos v. Triple-S Salud, Inc., 55 F.4th 286, 293 (1st Cir. 2022).

The purpose of the Sherman Act is to ensure customers the benefits of price competition, which includes protecting their economic freedom to participate in the relevant market. See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538 (1983). Specifically, the Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the

[2] "Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). Accordingly, any document filed by a party pro se must be construed liberally, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citation and quotation marks omitted).

lowest prices, the highest quality and the greatest material progress. . . ." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). Although the Sherman Act outlaws all agreements "in restraint of trade," the Supreme Court has continually recognized that Congress only intended to prohibit "unreasonable restraints" to trade. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). Unreasonable restraints of trade include conduct such as price fixing, division of markets, and group boycotts. N. Pac. Ry. Co., 356 U.S. at 5. Contrastingly, conduct that impacts individual employment opportunities may not constitute an unreasonable restraint of trade. See Donovan, 883 F. Supp. at 783. In general, if conduct is in violation of the Sherman Act, "[it] may be expected to cause ripples of harm to flow through the Nation's economy." Blue Shield of Virginia v. McCready, 457 U.S. 465, 476–77 (1982).

To determine whether a plaintiff has antitrust standing, courts conduct "an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." RSA Media, Inc. v. AK Media Grp., Inc., 260 F.3d 10, 13 (1st Cir. 2001) (citation and quotation marks omitted). Specifically, courts use the following six-factor balancing test to determine whether a plaintiff has antitrust standing:

> (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws ("antitrust injury"); (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages.

Vazquez-Ramos, 55 F.4th at 293 (citation omitted).

A court must "consider the balance of factors in each case." Sullivan v. Tagliabue, 25 F.3d 43, 46 (1st Cir. 1994). While no one factor is determinative, the First Circuit has explored both the issue of causation and the showing of an antitrust injury as important considerations in the balancing test. See Vazquez-Ramos, 55 F.4th at 293-94; Sullivan, 25 F.3d at 47 n.9. The first

and fourth factors specifically refer to causation. Vazquez-Ramos, 55 F.4th at 293. The third factor does not specifically raise the issue of causation, but the First Circuit has "defined 'antitrust injury' as injury of the type the antitrust laws were intended to prevent and that *flows from that which makes the defendants' acts unlawful*." RSA, 260 F.3d at 14 (citation and quotation marks omitted) (emphasis in original). Said differently, the alleged injury must be "the type of injury the antitrust violation would cause to competition." Vazquez-Ramos, 255 F.4th at 294 (citation omitted).

With respect to an antitrust injury, "[a]nticompetitive . . . refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process." Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988) (citation omitted). "[T]he absence of anti-trust injury will generally defeat standing." RSA, 260 F.3d at 14 (citation and quotation marks omitted).

Here, Defendant does not contend that Plaintiff lacks Article III standing, and indeed, it appears that he has constitutional standing. Defendant, however, asserts that Plaintiff lacks antitrust standing to bring a claim pursuant to the Sherman Act.

The factors here weigh against antitrust standing. Plaintiff has not adequately pleaded a causal connection between the employment agreement and his inability to secure employment. Specifically, he has not articulated how his inability to share Defendant's confidential information and trade secrets has limited his opportunity to find work. Moreover, Plaintiff's injury is not one that the antitrust laws intended to prevent.

As to the issue of antitrust injury, Plaintiff does not appear to have suffered one. First, the asserted antitrust injury does not seem to flow from Defendant's allegedly unlawful action. Specifically, Plaintiff's inability to find work does not appear to stem from the alleged restrictive

language of the agreement. Rather, it flows from Defendant's refusal to provide prospective employers with information about Plaintiff's employment, which does not constitute an antitrust violation. Second and more importantly, Plaintiff's alleged injury is not one that the antitrust laws were intended to prevent. Plaintiff alleges that the restrictive agreement limited his personal professional mobility and career prospects. However, the antitrust laws concern themselves not with injury to the individual, but rather to the competitive process as a whole. See Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767 n. 14 ("'[The] antitrust laws . . . were enacted for the protection of competition, not competitors.'").

With respect to improper motive, Plaintiff has alleged nothing indicating that Defendant acted with bad intent in requesting that Plaintiff sign the employment agreement containing a confidentiality clause. Indeed, employment agreements with confidentiality provisions are common in the workplace and can allow for a freer exchange of confidential information between the employer and employee. See KW Plastics v. U.S. Can Co., No. 99-D-286-N, 2000 U.S. Distr. LEXIS 15885, at *68 (M.D. Ala. Oct. 6, 2000).

Furthermore, the issue of whether Plaintiff's damages are speculative does not weigh in his favor. "Damages may be considered speculative where the plaintiff's injury was indirect and possibly the result of intervening factors unrelated to the defendant's conduct." Donovan, 883 F. Supp. at 783. Plaintiff's injury here, his inability to obtain a job, does not appear to stem directly from the confidentiality provision of the employment agreement. Plaintiff does not attempt to explain how his inability to share confidential information or trade secrets has inhibited him from securing employment. As noted above, Plaintiff's inability to secure employment appears to stem instead from Defendant's refusal to provide prospective employers with Plaintiff's employment record.

In addition, there is a possibility of intervening factors wholly unrelated to Defendant's conduct here. Plaintiff alleges that he has been unable to secure employment in the last three years "during one of the hottest labor markets." However, Plaintiff does not provide information to show that he is otherwise qualified for the jobs to which he applied, nor does he indicate the number of applications he submitted. Because Plaintiff's injury is indirect and possibly the result of other factors unrelated to the Defendant's conduct, the issue of whether Plaintiff's damages are speculative does not weigh in his favor.

With respect to the issue of duplicative recovery, this risk is minor and weighs in favor of Plaintiff. In general, duplicative injury exists when one party seeks recovery for injuries similar to those that other parties have suffered. See Associated Gen. Contractors of California, 459 U.S. at 550. "[I]n the absence of an action by a party claiming a more direct antitrust injury…there is little risk of duplicative injury." Donovan, 883 F. Supp at 784. Here, no party claims a similar injury. In fact, given that Plaintiff's alleged antitrust injury is personal in nature because it relates to an individual inability to secure employment, it is unlikely that such a party exists. Thus, the risk of duplicative recovery in this action is likely low and weighs in favor of Plaintiff.

In light of the above, Plaintiff appears to lack antitrust standing to assert a Sherman Act claim, and Defendant's motion to dismiss could be granted on that basis alone. Because this will be an R&R, I have included an analysis under Rule 12(b)(6) as well.

3. Rule 12(b)(6)

Defendant argues that Plaintiff has failed to state a claim under section 1 of the Sherman Act.[3] A section 1 claim has two elements: "First, there must be concerted action" and "[s]econd,

[3] Section 1 of the Sherman Act "proscribes contracts and conspiracies in restraint of trade," while section 2 "prohibits the monopolization or attempted monopolization of an area of trade."

the actors' agreement must involve either restrictions that are per se illegal or restraints of trade that fail scrutiny under the rule of reason." Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 16 (1st Cir. 2004).

A. Concerted Action

Concerted action occurs when "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." Copperweld, 467 U.S. at 769. Congress treats concerted behavior more strictly because "[c]oncerted activity inherently is fraught with anticompetitive risk." Id. at 768-69.

"[A]greements between two or more actors who operate within and for the benefit of a single economic enterprise do not satisfy the concerted action requirement of Section 1." Podiatrist Ass'n, Inc. v. La Cruz Azul De Puerto Rico, Inc., 332 F.3d 6, 13 (1st Cir. 2003) (citing Copperweld, 467 U.S. at 769).

Here, Defendant does not appear to be engaging in concerted action. Although individual members of Defendant's organization may have collaborated in the drafting of Defendant's employment agreement, activity within a single company does not constitute concerted action.

Moreover, although Plaintiff seems to imply that Defendant is collaborating with Company X and other companies to prevent him from obtaining employment by way of "no-poach" agreements, he does not allege any facts from which this Court could determine such agreements exist. Indeed, Plaintiff explicitly states that he is unaware of any "no-poach" agreements. Furthermore, Plaintiff has pointed to nothing, other than his own inability to obtain

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Vazquez-Ramos, 55 F.4th at 296. Plaintiff does not state the section pursuant to which he brings his claims. Based on his pleadings, in particular that he focuses on his contract with Defendant and does not make any allegations regarding monopolization, it appears that he intended to bring a claim pursuant to section 1.

employment, to indicate any coordinated action between Defendant and other companies. In fact, Plaintiff's only allegations regarding interactions between Defendant and any other company show quite the opposite of concerted action. Specifically, Plaintiff alleges that Company X informed him that their requests for references to Defendant went unanswered.

In light of the above, concerted action does not exist in this case. Accordingly, the first element of a section 1 claim has not been met.

B. Rule of Reason[4]

Defendant argues that Plaintiff's claim also fails on the second element of a section 1 claim because he has not alleged any injury to competition or a market. Rather, Plaintiff contends that the restrictive covenant agreement impacted him, and him alone.

Restrictive covenant agreements "are not per se illegal, and therefore, must be analyzed under the rule of reason." Caudill v. Lancaster Bingo Co., Inc., No. 2:04-CV-695, 2005 WL 2738930, at *4 (S.D. Ohio. Oct. 24, 2005); see Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 189 (7th Cir. 1985).

Under the rule of reason, courts engage in a "fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition." Vazquez-Ramos, 55 F.4th at 299 (quoting Copperweld, 467 U.S. at 768). This rule requires that the plaintiff first define the relevant market. Vazquez-Ramos, 55 F.4th at 296; Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018) (stating that "courts usually cannot properly apply the rule of reason" for a section 1 claim "without an accurate definition of the relevant market"). The

[4] Following Defendant's submission of its motion to dismiss and accompanying memorandum, the First Circuit issued a decision that outlines a new test to evaluate whether a restraint violates the rule of reason. See Vazquez-Ramos, 55 F.4th. In light of the First Circuit's recent decision, I have used the new test for my analysis.

relevant market is "the area of effective competition" (Am. Express, 138 S. Ct. at 2285) and encompasses both a relevant geographic market and a relevant product market. Flovac, Inc. v. Airvac, Inc., 817 F.3d 849, 853 (1st Cir. 2016).

After defining the relevant market, a court must define whether a restraint violates the rule of reason. The First Circuit has developed a three-part burden-shifting framework to make this determination. Vazquez-Ramos, 55 F.4th at 299; see Am. Express, 138 S. Ct. at 2284. First, the plaintiff must "prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." Vazquez-Ramos, 55 F.4th at 299; see Am. Express, 138 S. Ct. at 2284. Next, the burden shifts to the defendant to show "a procompetitive rationale for the restraint." Vazquez-Ramos, 55 F.4th at 299; see Am. Express, 138 S. Ct. at 2284. Finally, the burden shifts back to the plaintiff to prove that "the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." Vazquez-Ramos, 55 F.4th at 299; see Am. Express, 138 S. Ct. at 2284. If the plaintiff does not meet his or her burden in the first step, the analysis need not proceed. See Am. Express, 138 S. Ct. at 2290.

Here, the only reference to geography in Plaintiff's complaint is his allegation that the employment agreement includes no geographic scope. With respect to the alleged impacts of the agreement, he has not defined the geographic market or alleged a relevant product market. Accordingly, the first requirement of the rule of reason has not been met.

Even if Plaintiff had identified a relevant market, he would still have to plead that the employment agreement violates the rule of reason. He has not done so. Specifically, Plaintiff has not shown in his complaint that the employment agreement has a substantial anticompetitive effect that harms consumers. Although Plaintiff alleges that the employment agreement impacted his personal employment prospects, he has not alleged that the agreement impacts anyone else.

Because Plaintiff has not met his burden in the first part of the three-part test, he has not demonstrated that the employment agreement violates the rule of reason.[5] Accordingly, the second element of a section 1 claim has not been met either. In light of the above, Plaintiff has failed to state a claim under the Sherman Act.

III. RECOMMENDATION

In light of the above, I suggest that this Court issue an R&R recommending that the district judge to whom this case is assigned grant Defendant's motion to dismiss Plaintiff's complaint.[6]

[5] Where Plaintiff has not met his initial burden, it is not necessary to conduct an analysis for the second and third parts of the test. See Am. Express, 138 S. Ct. at 2290.
[6] Because Plaintiff is pro se, I considered suggesting that you recommend granting the motion to dismiss without prejudice to allow Plaintiff to refile and assert a different claim. However, it does not appear that any alternative cause of action would address his alleged injury.

Applicant Details

First Name	**Margaret**
Last Name	**Wells**
Citizenship Status	**U. S. Citizen**
Email Address	**margaretw@uchicago.edu**
Address	**Address** Street **5454 South Shore Dr. Apt. 822** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**9524657896**

Applicant Education

BA/BS From	**Emory University**
Date of BA/BS	**May 2021**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Ginsburg, Thomas
tginsburg@uchicago.edu
773-834-3087
Zunkel, Erica
ezunkel@uchicago.edu
773-702-9494
Huq, Aziz
huq@uchicago.edu
773-702-9566

This applicant has certified that all data entered in this profile and any application documents are true and correct.

5454 South Shore Dr., Apt.
822 Chicago, IL 60615
(952) 465-7896

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby St., Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024 term.

I am eager to clerk to build my legal research and writing skills and to contribute to the important work before the Eastern District of Virginia. In the Federal Criminal Justice Clinic (FCJC) this past year, I have had the opportunity to work on a post-conviction motion for early release from its conception through the District Court's decision to release our client. I worked on every step of this process, from gathering evidence from the client's friends and family, to conducting research on developing caselaw in the Seventh Circuit, to finally writing a substantial portion of our brief. Most meaningfully, I had the opportunity to draft our reply to the government. My experience in FCJC has shown me firsthand how powerful great legal research and writing can be. I hope to build on this experience in a clerkship and continue to develop these important skills for my future career.

In particular, I hope to clerk to obtain meaningful mentorship from a federal judge. My experience at the University of Chicago Law School has demonstrated the importance mentors can make on my legal career. Thanks to the guidance and encouragement from Professors Zunkel and Huq, I have gained invaluable practical research and writing experience. I hope that a clerkship will enable me to build a relationship with a judge and co-clerks that spans my legal career.

I have enclosed my resume, transcript, and writing sample. Letters of recommendation from Professors Aziz Huq, Erica Zunkel, and Thomas Ginsburg will arrive under a separate cover. Please do not hesitate to let me know if you require additional information.

Sincerely,

/s/ Margaret Wells

Margaret Wells

Enclosures

Margaret Wells

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EDUCATION

The University of Chicago Law School, Chicago, IL
Juris Doctor, expected June 2024
Journal:

- *Chicago Journal of International Law*, Online Editor

Activities:

- Chicago Law Foundation, Vice President of Auction
- Law School Musical, Director
- Orientation Leader and Peer Advisor

Emory University, College of Arts and Sciences, Atlanta, GA
Bachelor of Arts in English and Political Science, *magna cum laude,* May 2021
Honors:

- Honors Thesis in English, "Seeking Transcendence in a Time of War: Theology and Saving Civilization in T.S. Eliot's *Four Quartets*"

Activities:

- Barkley Forum for Debate, Deliberation, and Dialogue, Competitive Debater and Historian

EXPERIENCE

Hon. Timothy B. Dyk, United States Court of Appeals for the Federal Circuit, Washington, D.C.
Law Clerk, August 2025 – August 2026

Sullivan & Cromwell LLP, New York, NY
Summer Associate, June 2023 – August 2023

Federal Criminal Justice Clinic, Chicago, IL
Student Staffer, September 2022 – Present

- Author compassionate release motions for incarcerated clients, resulting in a client's early release
- Engage in advocacy by drafting witness testimony and public comments for the U.S. Sentencing Commission regarding an updated Policy Statement to guide judges' use of compassionate release
- Interview clients' friends and family and draft letters of support for sentencing reduction motions

Professor Aziz Huq, The University of Chicago Law School, Chicago, IL
Research Assistant, June 2022 – Present

- Conduct research on post-*Dobbs* abortion-related data privacy for a law review article
- Proofread and create a bibliography for a forthcoming book on the rule of law

Kilpatrick Townsend & Stockton LLP, Atlanta, GA
Summer Associate, May 2022 – August 2022
Trademark Intern, May 2019 – August 2019

- Conducted legal research and drafted memoranda across trademark, corporate, and litigation groups
- Prepared demand letters and settlement agreements for trademark portfolio management
- Participated in pro bono clinics focused on a variety of issues including criminal justice and immigration
- Collected evidence for upcoming litigation from social media posts, web archives, and sales records

Glenbrook South High School, Glenview, IL
Assistant Debate Coach, October 2019 – August 2021

- Designed strategy briefs outlining possible perspectives on policy issues and counterarguments
- Developed curriculum on effective communication and evidence-based decision-making for 50+ students

INTERESTS AND LANGUAGE SKILLS

- HIIT and cycling workout classes, reality TV dating shows, attending baseball games, baking desserts
- Proficient in French

THE UNIVERSITY OF CHICAGO

Name: Margaret E Wells
Student ID: 12335030

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

Emory University
Atlanta, Georgia
Bachelor of Arts 2021

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Richard Mcadams	3	3	178
LAWS	30211	Civil Procedure Diane Wood	4	4	179
LAWS	30611	Torts Saul Levmore	4	4	172
LAWS	30711	Legal Research and Writing Daniel Wilf-Townsend	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	180
LAWS	30411	Property Thomas Gallanis Jr	4	4	183
LAWS	30511	Contracts Bridget Fahey	4	4	179
LAWS	30711	Legal Research and Writing Daniel Wilf-Townsend	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Daniel Wilf-Townsend	2	2	180
LAWS	30713	Transactional Lawyering Joan Neal	3	3	182
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	182
LAWS	43201	Comparative Legal Institutions	3	3	181
Req Designation:		Meets Substantial Research Paper Requirement Thomas Ginsburg			
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	42301	Business Organizations Anthony Casey	3	3	181
LAWS	45801	Copyright Randal Picker	3	3	184
LAWS	46101	Administrative Law Thomas Ginsburg	3	3	181
LAWS	90221	Federal Criminal Justice Clinic Erica Zunkel Alison Siegler Judith Miller	1	0	
LAWS	95030	Moot Court Boot Camp Rebecca Horwitz Madeline Lansky	2	2	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	179
LAWS	45701	Trademarks and Unfair Competition Omri Ben-Shahar	3	3	176
LAWS	53221	Current Issues in Criminal and National Security Law	3	3	179
Req Designation:		Meets Writing Project Requirement Michael Scudder			
LAWS	90221	Federal Criminal Justice Clinic Erica Zunkel Alison Siegler Judith Miller	1	0	

Date Issued: 06/11/2023

THE UNIVERSITY OF CHICAGO

Name: Margaret E Wells
Student ID: 12335030

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	43244	Patent Law Jonathan Masur	3	3	183
LAWS	43253	Regulation of Banks and Financial Institutions Adriana Robertson	3	3	177
LAWS	47301	Criminal Procedure II: From Bail to Jail Alison Siegler	3	3	182
LAWS	90221	Federal Criminal Justice Clinic Erica Zunkel Alison Siegler Judith Miller	3	0	

End of University of Chicago Law School

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

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Professor Tom Ginsburg
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to recommend Maggie Wells, a member of the class of 2024, for a clerkship in your chambers. Maggie is a very strong candidate. She is very bright, a natural leader and a strong writer, and I recommend her very highly.

I first met Maggie during the Spring Quarter of her 1L year when she enrolled in my elective course in Comparative Legal Institutions. This course is designed to encourage thinking about law from a broad interdisciplinary perspective. In particular, it looks at law across time and space, integrating literatures from political science and economics along with more conventional legal materials. We survey, among other legal systems, those of imperial China and classical Islam, focusing on judicial institutions and their core structures. Maggie was an enthusiastic class participant who always added value to the class discussion, and demonstrated the ability to think creatively in dealing with novel material.

Maggie decided to write a paper in lieu of the exam, crafting an essay on music and law with regard to police violence in France and the United States. This was clearly the tougher route for a grade, but she submitted an excellent essay that required a round of feedback according to Law School rules. We had the chance to discuss it and she revised according to my relatively few suggestions. The paper earned an A grade and I can verify that she is both a fine writer, whose first drafts will be in excellent shape, as well as someone who is responsive to suggestions.
In the Fall of 2022, Maggie enrolled as a student in my course in Administrative Law, which is of course a field in significant flux. She wan excellent addition to the class, reflecting her abiding interest in public service. She was an engaged and constructive participant in classroom discussions, whose interventions were always helpful in moving the class forward. She demonstrated a deep understanding of the material, and her serious commitment made the class much better. Maggie's exam was one of the stronger ones in the class of 60 students, which as a group was among the best I have ever taught. I estimate she was in the top ten percent. I see that my experience with Maggie was hardly unique, as she has done well in a broad array of classes.

Maggie is a thoughtful and fun person to be around. She is engaged in several student organizations and universally well like by peers and faculty. She believes in mentorship, and herself has a good deal of experience in this regard. I believe that Maggie will be a wonderful person to mentor and to work with in chambers. She will soak up ideas, and turn around assignments quickly and with great skill.

The bottom line is that Maggie Wells is simply an excellent law student, who will be a smart, hardworking, and focused clerk, as well as a superb leader thereafter. I recommend her very highly and urge you to interview her. You will not be disappointed.

Please do not hesitate to contact me for further information or detail.

Sincerely,
Tom Ginsburg

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
Federal Criminal Justice Clinic

Erica Zunkel
Clinical Professor of Law
Associate Director, Federal Criminal Justice Clinic

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Recommendation for Margaret Wells

Dear Judge Walker:

I give Margaret ("Maggie") Wells my highest recommendation for a clerkship in your chambers. Maggie possesses unwavering determination, exceptional research and writing abilities, and a penchant for creativity that would make her an outstanding law clerk. Her overall academic record has established her as a top student at the Law School, with a GPA that puts her on track to graduate with Honors. Beyond her academic achievements, Maggie is a joy to work with, exhibiting a warm and amiable personality that aligns with her complete commitment to her work. Maggie has emphasized to me the significance of mentorship in her career, and one of the reasons she is pursuing a clerkship is to receive close guidance and tutelage from a federal judge.

This year, I had the privilege of working closely with Maggie in my Federal Criminal Justice Clinic, the country's inaugural law clinic specializing in representing indigent clients charged with federal felony offenses. Because of the intense demands of my Clinic's cases, we have a preference for third-year students who have more time in their schedules and who have taken advanced criminal law classes. Despite being a second-year student with a full academic course load and other extracurricular activities, including leadership roles in several Law School organizations, Maggie excelled in my Clinic. Throughout the year, I entrusted her with tasks that are usually reserved for my most skilled third-year students, and she exceeded all expectations.

Maggie's dedication to her work and top-notch legal skills were on full display during her time in my Clinic. She represented individual clients and played a key role in my Clinic's systemic efforts to expand federal compassionate release. Her remarkable breadth of work included writing a lengthy compassionate release motion and reply brief that secured early release for our client, who was a victim of the ATF's stash house reverse sting operation. Maggie's legal writing skillfully highlighted the extraordinary and compelling nature of our client's unique circumstances, leading to our client's well-deserved release ten years early (he was serving a 25-year mandatory minimum sentence). Throughout the writing process, Maggie was receptive

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to feedback and diligently incorporated revisions to enhance our arguments' strength and clarity.

Moreover, Maggie was instrumental in our Clinic's advocacy efforts to enshrine an expansive compassionate release policy statement. She helped me prepare for my oral and written testimony before the U.S. Sentencing Commission by drafting the most legally complex section of the written testimony, which argued for changes in the law to be an enumerated "extraordinary and compelling" reason for release. Her nuanced and detail-oriented approach was a perfect fit for this challenging task. Maggie also assisted me with preparing for my oral testimony, including mooting me several times and providing fantastic suggestions that made my arguments stronger. Additionally, Maggie spearheaded my Clinic's efforts to ensure the new policy statement's success by researching and cataloging compassionate release cases, developing case screening tools, and writing comprehensive litigation primers for attorneys.

Beyond her exceptional legal skills, Maggie's professionalism and commitment to her community are noteworthy. She was always well-prepared for our team meetings and Clinic seminar and worked harmoniously with her student colleagues and my Clinic's social worker. Maggie is also deeply involved in various Law School extracurricular activities, holding leadership positions in the Chicago Law Foundation, American Constitution Society, and the Law School Musical.

Maggie is a special student. The same qualities she has shown during her time in my Clinic—brilliance, dedication, and conscientiousness—are attributes that will make her a wonderful clerk, especially when combined with her strong research and writing skills. If you would like to discuss Maggie's qualifications further, please do not hesitate to call me at (510) 332-1490.

Sincerely,

Erica K. Zunkel
Clinical Professor of Law
Associate Director, Federal Criminal Justice Clinic

Aziz Huq
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May 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Margaret Wells (University of Chicago Class of 2024), to the position of law clerk in your chambers. I know Margaret ("Maggie") through having taught her in a 1L class—an elective in Constitutional Law: Equal Protection and Due Process—and because she has worked for me as a research assistant since June 2022. Maggie put in a stellar performance in her 1L constitutional law class, and also has a very strong transcript. She has demonstrated the ability to achieve grades at the very top of her cohort across a range of topics in both public and private law. My own experience working with her as a research assistant suggests to me that she is diligent, thorough, careful, and analytically precise. She is also very personable, and a pleasure to have as a collaborator on law-related projects. I hence think that Maggie will be an absolutely stellar law clerk. Indeed, without any hesitation at all, I recommend her strongly in that capacity.

I taught Maggie in a 1L elective called Constitutional Law: Equal Protection and Due Process. This involved a great deal of history, and in particular focuses on the way in which different moments in history have shaped the selection of judicial controversies and the nature of the rules that emerge. Maggie wrote an absolutely terrific exam. I write complex, issue-intensive exams that demand an ability to read a detailed fact pattern and immediately perceive not just the presence of a legal issue, but also a host of interactions between the legal issue and the facts, and also the several alternative (often outcome dispositive) ways of framing the issue. I identify ex ante 200 distinct points and subpoints that could be raised based on the exam prompts, and then grade students accordingly. This approach means I obtain a dispersion of grades that ensures meaningful distinction. Maggie's exam was very close to the top grade. It excelled in terms of drafting skill and in terms of the knowledge on display in terms of comprehensiveness, complexity, and clarity by a substantial margin. She hence demonstrated a deep fluency with the legal issues, and a sophistication in making arguments using the law. In class, consistent with this, Maggie evinced the same sort of contextually nuanced sense of how law operates in the world. She was always respectful, but measured and forceful, in her responses—always ready to speak up for her perspective when others disagreed. I thought that all of her contributions elevated the level of the class, and added to her peers' experience.

More generally, Maggie has built up a terrific transcript with ample evidence of deep legal and analytic skills. She has hence obtained grades at the very top of her class in no less than ten courses. As I explain below, this is a really impressive achievement. It is all the more impressive because the classes involved are so varied. Maggie has secured very, very strong grades in Copyright, Administrative Law, Transactional Lawyering, and Property. (Her worst grades, I should note further, are from the first quarter of law school—when she seemed to have been finding her footing). Her performance hence suggests that she would quickly master a wide range of different legal problems and challenges, as would be needful in a fast-paced federal clerkship.

These grades, moreover, should be understood in the general context of Chicago assessment modalities. Unlike many other law schools, Chicago abjures grade inflation in favor of a very strict curve round a median score of 177 (which is a B in our argot). There is not large movement from the median. And because Chicago grades on a normal distribution, and because it is on the quarter system, it is possible to be very precise about where a student falls in a class as a whole. It is simply not possible to do this so with a grading system of the kind used by some of our peer schools: These are seemingly designed to render ambiguous and inscrutable differences between the second tier of students and the third- and fourth-tiers. This has two implications for Maggie's grades. The first is that the sheer number of A grades should be recognized as a really impressive achievement: It is common for students to have one or two such grades, but the sheer volume of such scores on Maggie's transcript is really impressive. Second, even where Maggie has not scored an A, her grades tend to place her in the top echelon of the class. Hers is, in short, a really impressive transcript. And it bears emphasis that I rarely see ones that are this good as hers in the round. (Maggie, I should note, did not participate in the write-on contest to Law Review because, at the time, she was very focused on transactional legal practice. Had she applied, I think she likely would have gotten onto the Review).

Maggie has also been a terrific research assistant. I have asked for her help on a number of projects, including one about the regulation of personal data pertaining to reproductive health and another concerning some original understanding questions related to Article I. On very varied projects, which required searches into different kinds of sources and databases, Maggie has consistently shown herself to be reliable, careful and thorough. I feel very lucky that I can lean on her judgment and skill in respect to legal research, and that I have never had to be concerned about untimely work. I think this experience goes directly to what it would be like to have Maggie working as a law clerk. And I cannot underscore enough how positive it was.

Beyond this work, Maggie has been an active member of the law school community, contributing in many different ways. She put on and directed, for example, this year's law school musical: This is an immensely challenging logistical and artistic task, and I understand that Maggie executed it with aplomb and diplomacy. The result, I am told, was a terrific artistic success. She would also come to a clerkship with two summers' experience of law firms, and also a deep well of work with our federal criminal justice clinic.

Based on all this evidence, I have every expectation that Maggie will be an exceptionally good law clerk. I am thus a very keen supporter of her application, and very much hope you consider it seriously. I would be happy to answer any questions you have about Maggie's candidacy and can be reached at your disposal at huq@uchicago.edu or 703 702 9566.

Sincerely,

Aziz Huq

Frank and Bernice J. Greenberg Professor of Law

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Writing Sample

I prepared the attached writing sample for my Criminal and National Security Law seminar at the University of Chicago Law School. For this assignment, I was tasked with writing a Supreme Court majority opinion and dissent based on a current issue in national security law. I was provided with the relevant statute, the Ninth Circuit opinion, and the Supreme Court briefs for the Petitioners, the Respondent, and United States to complete this assignment. To create a 12-page writing sample, I omitted the dissent. I received feedback from my school's writing coach.

Justice Kagan delivered the opinion of the Court.

I

This dispute arises from a terrorist attack that occurred in the fall of 2015. At that time, Nohemi Gonzalez, a U.S. citizen, was studying abroad in Paris. On November 13th, three armed terrorists – Abdelhamid Abaaoud, Brahim Abdeslam, and Chakib Akrouh – stormed into the café where Nohemi was eating dinner with her friends and opened fire. Nohemi was killed in the gunfire, which was one part of a larger series of terrorist attacks in Paris on that day. These attacks tragically killed 130 people, and injured hundreds more. Shortly after the attacks, the Islamic State of Iraq and Syria (ISIS), a foreign terrorist organization, released a YouTube video and a written statement claiming responsibility.

YouTube is a social media platform that hosts third-party video content. YouTube allows users to make profiles, like and subscribe to content, and upload and watch videos. Based on an individual user's profile and site history, YouTube's algorithms recommend additional content designed to keep users on the site. In 2015, these recommendations appeared in a queue labeled "Up Next" that played automatically after a video ended.

The petitioners, Nohemi Gonzalez's family and estate, filed a suit pursuant to the Anti-Terrorism Act (ATA) alleging that YouTube is directly and secondarily liable for

Nohemi's death. The petitioners' claims argue that YouTube's algorithms highlight ISIS-related content and recommend videos to users susceptible to ISIS' messages. As a result, the petitioners argue, YouTube spreads ISIS' violent propaganda and facilitates new member recruitment for the organization. The petitioners' complaint additionally provides evidence from the Paris attacks. They allege that two terrorists involved in the attacks frequently posted links on their social media accounts to ISIS recruitment videos available on YouTube. Moreover, the complaint states that one of the armed gunmen from the café, Abaaoud, appeared in an ISIS recruitment video in 2014.

The subject of this dispute is YouTube's immunity pursuant to the Communications Decency Act (CDA). Under the statute, an interactive computer service provider is immune from claims that treat it as the "publisher or speaker" of content created or developed by "another information content provider." 47 U.S.C. § 230(c)(1). Both the District Court and the Ninth Circuit found that the CDA immunized YouTube from this lawsuit. Without guidance from this Court, the Ninth Circuit has interpreted "publisher" to encompass "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." *Gonzalez v. Google LLC*, 2 F.4th 871, 892 (9th Cir. 2021) (citing *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (*en banc*)). The lower courts determined that the petitioners' claims hold YouTube liable for its inability

to remove ISIS content from the platform, and as a result, the petitioners' claims treat YouTube as a publisher. *Id*.

The lower courts also found that YouTube's recommendations do not "create" or "develop" new content. YouTube is only immunized from content posted by third parties; however, the platform can face liability for information it creates or develops, even in part. The Ninth Circuit uses a material contribution test to determine whether a platform creates or develops content. *Gonzalez*, 2 F.4th at 892. This contribution "does not refer to "merely . . . augmenting the content generally, but to materially contribute to its alleged unlawfulness."' *Id*. (quoting *Roommates*, 521 F.3d at 1167–68). The Ninth Circuit recently held in *Dryoff* that algorithms that analyze and augment content do not materially contribute to the underlying third-party information. *Dryoff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019). Analogizing YouTube's recommendations to the algorithms in *Dryoff*, the Ninth Circuit held that YouTube was not liable for ISIS' videos' creation or development. *Gonzalez*, 2 F.4th at 894.

The Ninth Circuit is not the only court of appeals to have weighed in on § 230's meaning. In fact, since the CDA's passage in 1996, every circuit has developed precedent defining and interpreting the scope of an internet content provider's immunity for publishing third-party content. *See, e.g., Universal Commc'n Sys., Inc.* v. *Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Force* v. *Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019); *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110 (4th Cir. Nov. 3, 2022) *Marshall's*

Locksmith Serv., Inc. v. *Google, LLC*, 925 F.3d 1263 (D.C. Cir. 2019). This Court has never weighed in on the Act's meaning, which has become an increasingly important issue as technology advances beyond what Congress could have possibly foreseen in 1996. We granted certiorari to clarify the scope of § 230(c)(1)'s immunity for publishers of third-party content.

II

This case presents a straightforward statutory interpretation question. We are charged with construing the CDA's immunity provision to determine if the text immunizes YouTube's actions. We hold today that the CDA's immunity extends to YouTube's recommendation algorithms.

We begin with the statute itself. Congress passed the CDA in 1996 to incentivize internet service providers to regulate obscene material online. *Force*, 934 F.3d at 78–79 (Katzmann, J., concurring in part). The Act aimed to balance this goal against imposing too much liability on web platforms, which many believed would harm technological development. *Id*. After considerable documented back and forth, Congress passed the CDA. *Id*. Congress' considerations surrounding obscenity culminated in CDA § 230(c) – "Protection for "Good Samaritan" blocking and screening of offensive material." The parties' dispute centers around 47 U.S.C. § 230(c)(1) which reads: "No provider or user

of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

To obtain immunity from civil liability under this provision, YouTube must meet three requirements. First, YouTube must be the "provider … of an interactive computer service." Second, the petitioners' cause of action must treat YouTube as a "publisher or speaker." Finally, the information out of which YouTube's liability arises must be "provided by another information content provider." 47 U.S.C. § 230(c)(1). This opinion proceeds taking each requirement in turn.

A

YouTube indisputably offers interactive computer services. The statute defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(1). To fall under this definition, the defendant merely needs to offer multiple people access to a server. Websites are quintessential interactive computer services because, as the respondent notes, "all data online is stored on servers." Brief for Respondent at 22, *Gonzalez v. Google*, 143 S. Ct. 1191 (2023) (No. 21-1333). YouTube provides users all over the world simultaneous access to videos and other content uploaded to its site. As a result, YouTube is clearly covered by the statute's plain language.

B

The CDA immunizes an interactive computer service provider from claims that treat it as a "publisher or speaker" of third-party content. 47 U.S.C. § 230(c)(1). Absent clear evidence to the contrary, we interpret the CDA using its plain meaning. *See, e.g., Sw. Airlines v. Saxon*, 142 S. Ct. 1783, 1788 (2022). "Publisher" refers to a party who "make[s] [information] generally known" or "disseminate[s] [information] to the public." Brief for Respondent at 23. Treat means "to regard … and act toward or deal with accordingly." Brief for Respondent at 23. To hold YouTube liable for ISIS' videos would be to treat YouTube as a publisher. Liability, in that case, attaches because YouTube broadcasts ISIS' videos to the public. Any theory of liability that relies on YouTube's dissemination of third-party information is immunized by the CDA.

"Publisher's" plain meaning also extends to YouTube's recommendations. These recommendations, at their core, are methods for promoting and organizing third-party content. The petitioners argue that the Act only immunizes YouTube from claims based on disseminating information. Brief for Petitioners at 26, *Gonzalez v. Google*, 143 S. Ct. 1191 (2023) (No. 21-1333). But the petitioners do not present a compelling distinction between disseminating information and promoting or organizing it. In fact, disseminating information necessarily includes selecting and organizing content. Publishers do not randomly broadcast information to the public: they choose what and how to publish. For example, a newspaper, which the petitioners concede is a publisher,

determines what content to publish and how to organize its pages. In our view, promoting and organizing content cannot be distinguished from disseminating information. As a result, the Act immunizes YouTube's recommendations.

Even the dissent's narrow statutory construction immunizes YouTube's recommendations. The Act's House and Senate materials make clear that Congress passed the CDA explicitly to overturn a New York state court decision that held a message board liable for defamation. Brief for Petitioners at 21–22. The petitioners argue that since Congress intended to overturn this decision, the term "publisher" in the statute refers to its narrow construction in defamation law. *Id*. But despite arguing that publication in defamation law is distinct from "publisher's" broad plain meaning, the petitioners do not offer a different, narrow construction of the term that would exclude YouTube's recommendations. A defendant in a defamation claim "publishes" information if he communicates the defamatory content to a third-party. *Id*. at 20. This is essentially the same definition as the one we offer above – disseminating information to the public – which we have already stated covers YouTube's recommendations.

Moreover, courts routinely hold publishers liable for defamation based on their organizational choices. The respondent points to a slew of cases where courts have held defendants liable for defamation based on how they choose to organize content. Brief for Respondent at 25–26. So even assuming YouTube's liability arises from the site's design choices, rather than its decision to broadcast third-party content, the result is the

same. Defamation tort law recognizes a publisher's liability for organizing content. Holding YouTube liable for how it organizes its pages and presents recommendations to users treats YouTube as a publisher.

Our decision today is rooted in the text. The dissent narrowly construes the term "publisher" based on a persuasive characterization of the Act's history. It is true that Congress passed the CDA to protect minors from obscenities online. Despite this narrow purpose, "Congress grabbed a bazooka to swat the *Stratton-Oakmont* fly." *Force*, 934 F.3d at 80 (Katzmann, J., concurring in part). The Act's broad language extends the CDA beyond its intended purpose. It is not our job to second guess whether this was Congress' intention, only Congress can clarify the Act's scope.[1] As a result, we hold that the term "publisher" encompasses YouTube's recommendations.

C

Finally, the CDA only immunizes YouTube from liability arising from information created or developed by third parties. *See* 47 U.S.C. § 230(c)(1). In other words, YouTube is not immunized by the statute for content it creates, in whole or in part. The dissent argues, in the alternative, that YouTube's recommendations do not merely disseminate third-party content, but create and send unique messages from the

[1] It is worth noting that Congress has extended and modified the CDA many times since its passage. During this time, circuit courts actively debated "publisher's" scope and determined that the Act conferred broad immunity on web platforms. Congress' inaction on this portion of the Act suggests to us that these circuits faithfully interpreted the Act's language. *See* Brief for Respondent at 30.

platform to its users. We agree with the dissent that YouTube is liable for the content it creates. However, we hold that YouTube's recommendations merely augment third-party content.

The CDA specifies that platforms are only immunized for content "provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute later defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the *creation* or *development* of information." 47 U.S.C. §230(f)(3) (emphasis added). This definition clarifies that a platform is responsible for the content it creates or develops, even if only in part. Thus, immunity turns on whether YouTube's recommendations create or develop the violent content.

In our view, YouTube does not create or develop ISIS-related content by highlighting the videos through its algorithms. We employ the same principles of statutory interpretation here as we do above, looking the statute's plain meaning. In ordinary parlance, "create" means '"to bring into existence" or to "make out of nothing and for the first time."' Brief for the United States as Amicus Curiae in Support of Vacatur at 21–22, *Gonzalez v. Google*, 143 S. Ct. 1191 (2023) (No. 21-1333). YouTube does not create the ISIS content from which ATA liability arises. ISIS posts the content on YouTube's platform and YouTube is uninvolved in bringing the videos into existence.

"Develop" could be construed narrowly, as a close synonym to create. Brief for the United States at 22. On the other hand, "develop" can also mean "to promote the growth of" or "expand by a process of growth," which might encompass YouTube's tools that organize and recommend content. *Id*. In our view, the CDA uses develop as a close synonym to create. This best comports with adjacent sections of the statute. Any other interpretation would open web platforms up to liability whenever they organize or promote content and render the statute unusable.

First, adjacent sections of the statute suggest "develop" excludes tools for organizing and promoting content. The statute defines "information content provider" to include "access software providers." 47 U.S.C. § 230(f)(1). The statute further defines "access software providers" as including "a provider of … enabling tools that … (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." 47 U.S.C. § 230(f)(4). As the government's amicus persuasively notes, it would be silly for Congress to explicitly immunize enabling tools that "transmit" and "organize" content but then take that immunity away through the word "develop." Brief for the United States at 23. YouTube's recommendations essentially organize and transmit content. This definition suggests that YouTube's algorithms fall explicitly within the statute's scope.

Second, holding that YouTube develops third-party content through its recommendation algorithms would make the CDA unusable. YouTube's algorithms

filter and organize content, promoting information to viewers based on their preferences. The respondent and the government note that all websites, including important search platforms, use algorithms to organize and filter results. Brief for the United States at 23; Brief for Respondent at 1–2. The dissent's interpretation would render the statute meaningless by making platforms co-developers of *any* content they organize. There is no way that a site could avoid becoming a developer in this world, because even basic web-design choices organize content on the screen.

A narrow definition of "develop" best captures the statute's goals, without making adjacent sections confusing and meaningless. Web platforms may be liable as authors for content they create. However, our interpretation forecloses the argument that YouTube's recommendation algorithms develop third-party content by augmenting the videos' reach. We therefore hold that YouTube is immunized from the petitioners' claims.

III

The dissenting Justice compellingly describes the policy rationale driving his construction of the statute. We are sympathetic to the petitioners' cause and recognize that social media sites are increasingly used by terrorist organizations to spread violent messages and recruit new members. *See Force*, 934 F.3d at 84–85 (Katzmann, J., concurring in part) (describing terrorist organizations' frequent social media use). Our

telecommunications laws should incentivize websites to police extremist messages on their platforms.

On the other hand, we are equally concerned about a narrow ruling imposing too much liability on these platforms. The CDA is often called "the twenty-six words that created the internet" because immunity permitted web platforms to flourish. Brief for Respondent at 7. Algorithms are particularly critical to the modern internet, where the internet's most basic functions, like Google search, rely on algorithms to process and promote information. We are worried about the unforeseen consequences of any other ruling that would potentially upend the careful balance Congress struck in the CDA.

It is important to stop the internet from proliferating terrorist messages. However, this Court should not determine the best mechanism for preventing the spread of this information. Congress is best equipped to handle these policy determinations. Since Congress passed the CDA, the internet has developed far beyond what Congress could have originally imagined. It is our job to interpret the plain meaning of the language Congress used in 1996 and apply it to today's context. If this language needs updating or narrowing, it is Congress' job to determine if and how to change the law.

The judgement of the Ninth Circuit is affirmed. *It is so ordered.*

Applicant Details

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Middle Initial	**J**
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Applicant Education

BA/BS From	**Washington & Lee University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 14, 2024**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**UCLA Criminal Justice Law Review, Articles Chief**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Skye Donald** **UCLA Moot Court Honors Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Colgan, Beth
colgan@law.ucla.edu
206-235-4760

Winkler, Adam
Winkler@law.ucla.edu
(310) 794-4099

Zatz, Noah
Zatz@law.ucla.edu
(310) 206-1674

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DAN WETTERHAHN

12114 Idaho Avenue, Apt. 4, Los Angeles, California 90025 | wetterhahn2024@lawnet.ucla.edu | 315.523.4742

June 12, 2023

The Honorable Jamar Walker
United States Courthouse
2400 West Avenue
Newport News, VA 23607

Re: Judicial Clerkship Application

Dear Judge Jamar Walker:

I am a rising third-year student at UCLA School of Law, interested in clerking for you beginning in the first term you are hiring for after May 2024, and any term after. It is my great aspiration to work as an Assistant United States Attorney. To that end I would like to learn all that I can about the function of the federal criminal justice system and the federal courts generally. There is no better way to accomplish this than to clerk in the chambers of a United States District Court judge. I spent last summer at the U.S. Attorney's Office for the Southern District of New York—this confirmed both my desire to return to the East Coast after I graduate and my dream of working as an AUSA. Clerking in Virginia would tremendously further both objectives and I am sure that I would be a good addition to your chambers. Further, during my undergraduate at Washington and Lee University I became very attached to the commonwealth and would treasure a chance to return.

My academic experiences have prepared me well for a clerkship in your chambers. I developed my excellent research and writing skills in writing my undergraduate honors thesis on punishment in international criminal law. My interest in criminal justice is also borne out in my participation in the UCLA Criminal Justice Law Review. This year I was a Staff Editor and next year I will be serving as Chief of Articles. Working on the journal has sharpened my attention to detail while allowing me to explore the cutting edge of developments in criminal law scholarship. My transcript also reflects my interest in federal criminal justice—notably in my affiliation with UCLA School of Law's Public Policy Program. Furthermore, my communication and advocacy skills have been honed in a Supreme Court Simulation last semester as well in my participation with Moot Court.

My professional experiences will also allow me to add value to your chambers. In a professional setting, I have pursued my interest in criminal justice as well as practiced research skills. As mentioned, last summer, I worked at the Criminal Division of the U.S. Attorney's office for the Southern District of New York. Much of my work at the U.S. Attorney's Office consisted of research for ongoing investigations—chiefly drawing up memoranda with my findings for use by supervising AUSAs. Additionally, I was fortunate enough to observe several criminal trials and participate in two, allowing me to see the impact of the judicial system in administering justice. This summer, I will continue to hone my professional skillset and experience as a Summer Associate in Baker McKenzie's Litigation Practice Group. Further, I will be externing in D.C.—likely at the DOJ—for my final semester.

In sum, I am confident that I have the skills to make a good contribution to your chambers if afforded the opportunity. Enclosed please find a copy of my résumé, transcript, writing sample and letters of recommendation from Professors Beth Colgan, Adam Winkler, and Noah Zatz. Thank you for your time and consideration.

Respectfully,

Dan Wetterhahn
Enclosures

DAN WETTERHAHN

12114 Idaho Avenue, Apt. 4, Los Angeles, California 90025 | wetterhahn2024@lawnet.ucla.edu | 315.523.4742

EDUCATION

UCLA School of Law | Los Angeles, California
J.D. Candidate, David J. Epstein Program in Public Interest Law & Policy May 2024 | GPA: 3.84 | Rank: Top 15%
Honors: Masin Family Academic Silver Award in Contracts (for the second highest super-sectional grade)
Mock Trial Fall Internal Competition, *Honorable Mention* (2021)
Moot Court: Moot Court Honors Board, *Problem Developer* (2023-), *Special Competitions Assistant* (2022-23), *Spring Internal Standby Ghost Competitor* (2023), *UCLA Law Cyber Security Competition Judge* (2023), *Fall Internal Standby Judge* (2022), *1L Skye Donald Competition Competitor* (2022)
Journals: UCLA Criminal Justice Law Review, *Chief of Articles* (2023-), *Staff Editor* (2023)

Washington and Lee University | Lexington, Virginia
B.A., *cum laude*, Philosophy with a Minor in Russian Language & Culture, May 2021 | GPA: 3.80
Honors: President's List (GPA top 30% of class year) (2019, 2020, 2021) | Phi Sigma Tau, International Philosophy Honor Society | Philosophy Major Honors | Edward Dodd Award (senior philosophy major showing exceptional qualities)
Thesis: "More Than Just Victor's Justice: A Defense of the Solely Retributive Character of Atrocity Crime Punishment by International Criminal Tribunals"
Activities: Washington and Lee University Singers Touring Choir, *Baritone* (2018-21), *Student Manager* (2020-21) | Washington and Lee Hillel, *Events Manager* (2020-21), *Shabbat Chair* (2019-20) | Washington and Lee Bentley Productions, *Lead Role in "Priscilla Queen of the Desert"* (2018)

EXPERIENCE

Baker McKenzie Los Angeles, California
Summer Associate, Litigation Practice Group Summer 2023

United States Attorney's Office, Southern District of New York, Criminal Division New York, New York
Summer Legal Intern May 2022-August 2022
- Assisted in two criminal trials from final pretrial conference to verdicts; prepared exhibits, participated in jury selection, and edited summations
- Performed and summarized legal research for Assistant United States Attorneys for use in ongoing investigations and trial proceedings
- Drafted internal memoranda and external briefs including compassionate release responses, foreign mutual legal assistance requests, criminal complaints, and sentencing submissions

UCLA El Centro, Labor and Economic Justice Clinic Los Angeles, California
Corporate Research Volunteer Fall 2021-Spring 2022
- Researched companies to aid the bargaining power of organized labor members in Los Angeles

Christian Worth for Delegate Lexington, Virginia
Deputy Field Organizer May 2019-November 2019
- Conducted direct outreach including door to door canvassing, speaking with hundreds of voters
- Recruited and trained campaign volunteers to increase voter contact and community engagement

Anthony Brindisi for Congress Utica, New York
Field Intern and Finance Intern February 2018-August 2018
- Conducted voter outreach including writing the campaign absentee voting guide
- Located and researched potential big dollar donors and wrote short biographies for use by the candidate

LANGUAGES AND INTERESTS

Intermediate proficiency in Russian
Enjoy French Republican History, Sailing, Rock Operas, Philosophy of Language, and Board Games

NAME: WETTERHAHN, DANIEL J
UCLA ID: 705859196
BIRTHDATE: 10/06/XXXX

UNIVERSITY OF CALIFORNIA, LOS ANGELES
LAW ACADEMIC TRANSCRIPT

PROGRAM OF STUDY
ADMIT DATE: 08/23/2021
SCHOOL OF LAW
MAJOR: LAW

DEGREES | CERTIFICATES AWARDED
NONE AWARDED

GRADUATE DEGREE PROGRESS
SAW COMPLETED IN LAW 666, 23S

PREVIOUS DEGREES
NONE REPORTED

CALIFORNIA RESIDENCE STATUS: NONRESIDENT

MEMORANDUM
MASIN FAMILY ACADEMIC SILVER AWARD
CONTRACTS, S. 7/8, 21F

END OF RECORD
NO ENTRIES BELOW THIS LINE

FALL SEMESTER 2021
MAJOR: LAW

CONTRACTS	LAW 100		4.0	17.2	A+
INTRO LEGL ANALYSIS	LAW 101		1.0	0.0	P
LAWYERING SKILLS	LAW 108A		2.0	0.0	IP
MULTIPLE TERM - IN PROGRESS					
TORTS	LAW 140		4.0	16.0	A
CIVIL PROCEDURE	LAW 145		4.0	14.8	A-
		ATM	PSD	PTS	GPA
	TERM TOTAL	13.0	13.0	48.0	4.000

SPRING SEMESTER 2022

LGL RSRCH & WRITING	LAW 108B		5.0	18.5	A-
END OF MULTIPLE TERM COURSE					
CRIMINAL LAW	LAW 120		4.0	16.0	A
PROPERTY	LAW 130		4.0	13.2	B+
CONSTITUT LAW I	LAW 148		4.0	16.0	A
FED CRIM SENTENCING	LAW 165		1.0	0.0	P
		ATM	PSD	PTS	GPA
	TERM TOTAL	18.0	18.0	63.7	3.747

FALL SEMESTER 2022

CRIM PRO:INVESTIGTN	LAW 202		4.0	14.8	A-
EVIDENCE	LAW 211		4.0	16.0	A
PROB SOLV PUB INT	LAW 541		3.0	12.0	A
TRIAL ADVOCACY	LAW 705		4.0	0.0	P
		ATM	PSD	PTS	GPA
	TERM TOTAL	15.0	15.0	42.8	3.891

SPRING SEMESTER 2023

FEDERAL COURTS	LAW 212		3.0	0.0	P
BUSINESS TORTS	LAW 252		2.0	7.4	A-
LABOR LAW	LAW 260		4.0	16.0	A
LAW & POL ECON DEBT	LAW 666		3.0	9.9	B+
SUPREME COURT SIMUL	LAW 727		2.0	8.0	A
CYBERSECURITY	LAW 962		1.0	3.7	A-
		ATM	PSD	PTS	GPA
	TERM TOTAL	15.0	15.0	45.0	3.750

LAW TOTALS

	ATM	PSD	PTS	GPA
PASS/UNSATISFACTORY TOTAL	9.0	9.0	N/A	N/A
GRADED TOTAL	52.0	52.0	N/A	N/A
CUMULATIVE TOTAL	61.0	61.0	199.5	3.837

TOTAL COMPLETED UNITS 61.0

Authentication
This official transcript is printed on security paper with a blue fading background, the Seal of the UCLA Office of the Registrar, and the signature of the Senior Director of Academic Services and Registrar, Brian Hansen.

UCLA SCHOOL OF LAW TRANSCRIPT LEGEND

UCLA School of Law
Records Office
Box 951476
Los Angeles, CA 90095-1476

(310) 825 – 2025
records@law.ucla.edu
http://www.law.ucla.edu

The following information is offered to assist in the evaluation of this student's academic record.

COURSE NUMBERS: (as of 2010) First year and MLS courses are numbered 100-199, advanced courses 200-499, seminars 500-699, experiential courses 700-799, externships 800-899, short courses 900-999. (1978-2010) First year courses are numbered 100-199, advanced courses 200-399, clinical courses 400-449, externships 450 – 499, and seminars 500 – 599.

CREDITS: Beginning 1978, credits are semester units, prior to that time, credits were quarter units.

EXPLANATION OF CODES FOUND TO THE RIGHT OF A COURSE ON OLDER TRANSCRIPTS

CODE	EXPLANATION
PU	Courses graded on a pass/Unsatisfactory/ No Credit basis
T1	First term of a multiple term course
2T	Final term of a multiple term course, unit total for all terms combined
TU	Final term of a multiple course graded on a Pass/Unsatisfactory/No Credit basis
UT	Final term of a multiple course graded on a Pass/Unsatisfactory/No Credit basis, unit total for all terms combined.

GRADE POINT AVERAGE (GPA) CALCULATION: The GPA is calculated by dividing grade points by graded units attempted. Transfer credits are not included in the UCLA GPA.

RANK: Until 1970, the School of Law ranked its graduates according to their final, cumulative grade point averages. Since that time, it has been the policy of the School of Law not to rank its student body. The only exceptions are:

- 1971 – 2015 - at the end of each academic year the top 10 students in the second- and third-year classes were ranked.
- 2016 – Present - at the end of each academic year the top 12 students in each class are ranked.
- 2009 – Present - the top ten percent of each LLM graduating class are ranked (by percentile, rather than numerically).
- The top ten percent of each JD graduating class is invited to join the Order of the Coif (a National Honorary Scholastic Society.)

HONORS:
2008 - Present - Masin Scholars – top 12 students at the end of the first year, prior to optional grade changes.
2013 – Present - Masin Gold Award (formerly Dean's Awards) – highest grade in each course graded on a curve. Masin Silver Award (formerly Runner-up Dean's Award) - second highest grade in each large course (40 or more students) graded on a curve.

ACCREDITATION: American Bar Association, 1952

CERTIFICATION: The Seal of the University of California, Los Angeles, Registrar's Office and the Registrar's signature.

FERPA NOTICE: This educational record is subject to the Federal Family Educational Rights and Privacy Act (FERPA) of 1974, and subsequent amendments. This educational record is furnished for official use only and may not be released to, or accessed by, outside agencies or third parties without the written consent of the student identified by this record.

EXPLANATION OF GRADING SYSTEM
1995 – Present

Grade & Grade Points	JD, LLM and SJD Student Definitions	MLS Student Definitions
A+ = 4.3	Extraordinary performance	Extraordinary performance
A = 4.0 A- = 3.7	Excellent performance	Superior Achievement
B+ = 3.3 B = 3.0 B- = 2.7	Good performance	Satisfactorily demonstrated potentiality for professional achievement in field of study
C+ = 2.3 C = 2.0 C- = 1.7	Satisfactory performance	Passed the course but did not do work indicative of potentiality for professional achievement in field of study
D+ = 1.3 D = 1.0	Unsatisfactory performance	Grade unavailable for MLS students
F	Lack of understanding of major aspects of the course No credit awarded	Fail
P	Pass (equivalent of C- and above) Not calculated into the GPA	Satisfactory (achievement at grade B level or better)
U	Unsatisfactory (equivalent to grades D+ and D)	Grade unavailable for MLS students
NC	No credit (equivalent to a grade of F) No unit credit awarded	No credit (equivalent to a grade of F) No unit credit awarded
LI	Incomplete, course work still in progress	Grade unavailable for MLS students
I	Grade unavailable for JD, LLM and SJD students	Incomplete, course work still in progress
IP	In Progress, multiple term course, grade given upon completion	In Progress, multiple term course, grade given upon completion
W	Withdrew from course	Withdrew from course
DR	Deferred Report	Deferred Report

Previous Grading Scales

GRADE	DEFINITION
100-85	A or excellent performance (grades of 95 and above demonstrate extraordinary performance)
84-75	B or good performance
74-65	C or satisfactory performance
64-55	D or unsatisfactory performance
54-50	F or lack of understanding of major aspects of the course No unit credit awarded
P	Pass (Equivalent to grades of 65 and above) Not calculated in the GPA
U = 62	Unsatisfactory (Equivalent to grades of 64-55)
NC = 50	No Credit (Equivalent to grades of 54-50) No unit credit awarded
IP	In Progress, multiple term course, grade given upon completion
W	Withdrew from course

GRADE	DEFINITION
H (high)	A or excellent performance
HP (high pass)	B or good performance
P (pass)	C or satisfactory performance
I (inadequate)	D or unsatisfactory performance
NC (no credit)	F or lack of understanding of major aspects of the course. No unit credit awarded
CR (credit)	Pass, unit credit awarded for the course
NR (in progress)	In progress, multiple term course, grade given upon completion
W	Withdrew from course

WASHINGTON AND LEE UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
Lexington, Virginia 24450-2116
540.458.8455

Student's Name: Daniel Joseph Wetterhahn
Wetterhahn, Daniel Joseph
Entered: 09/08/2016 as UGR:1ST-TIME 1ST-YR
Major: Philosophy

Date Produced: 09/29/2021
Current Program: Undergraduate Class: 2021
Current Status: Graduated 05/27/2021
Other Ed: SOUTH JEFFERSON CENTRAL SCHOOL Adams NY 13605
BA WASHINGTON AND LEE UNIVERSITY Lexington VA 24450

SSN: ***-**-7929
Student ID: 1730238
Birthdate: 10/06/****

	COURSE		ATT	COM	GRADE	POINTS
	ADV PLACEMENT					
BIOL	1SLN	100-LEVEL FDR-SL NON-MAJOR		4.0		
HIST	107	HIST OF THE U.S. TO 1876 (AP)		0.0		
HIST	108	HIST OF THE U.S. SINCE 1876		3.0		
HIST	174	GLOBAL HISTORY SINCE 1300		3.0		
HIST	101	EUROPEAN CIV,1500-1789 (AP)		0.0		
HIST	102	EUROPEAN CIV,1789-PRESENT		3.0		
HIST	173	GLOBAL HISTORY TO 1300 (AP)		0.0		
PE	100P	PASSED SWIM PROFICIENCY TEST		0.0		
SPAN	160P	WAIVER / NO CREDIT		0.0		
WRIT	100	FY WR SEM:		3.0		
	UGR-FALL TERM 2016-17					
INTR	201	INFORMATION TECH LITERACY	1.0	1.0	P	0.00
MUS	109M	MEN'S GLEE CLUB	1.0	1.0	A	4.00
PHIL	100	INTRODUCTION TO PHILOSOPHY	3.0	3.0	B+	9.99
PHIL	228	JOHN STUART MILL	3.0	0.0	RF	0.00
POL	111	INTRO TO POLITICAL PHILOSOPHY	3.0	3.0	A-	11.01
RUSS	111	ELEMENTARY RUSSIAN I	4.0	0.0	WF	0.00
Term	Cmpl Cr: 8.0	GPA Pts: 25.00	GPA Cr: 10.0	GPA: 2.500		
Cumul	Cmpl Cr: 24.0	GPA Pts: 25.00	GPA Cr: 7.0	GPA: 3.571		
	UGR-WINTER TERM 2016-17					
ECON	101	PRINS OF MICROECONOMICS	3.0	3.0	B-	8.01
MUS	109M	MEN'S GLEE CLUB	1.0	1.0	A	4.00
MUS	141V	APPLIED MUSIC-VOICE	1.0	1.0	B	3.00
PHIL	170	INTRO TO LOGIC	3.0	0.0	RD-	0.00
PHIL	246	PHILOSOPHY OF SEX	3.0	3.0	B	9.00
THTR	242	MUSICAL THEATER	3.0	3.0	A	12.00
Term	Cmpl Cr: 14.0	GPA Pts: 38.02	GPA Cr: 14.0	GPA: 2.716		
Cumul	Cmpl Cr: 35.0	GPA Pts: 61.01	GPA Cr: 18.0	GPA: 3.389		
	UGR-SPRING TERM 2016-17					
BUS	390	ST ABRD:LDRSHP&CROSS-CUL MGMT	4.0	4.0	A-	14.68
Term	Cmpl Cr: 4.0	GPA Pts: 14.68	GPA Cr: 4.0	GPA: 3.670		
Cumul	Cmpl Cr: 39.0	GPA Pts: 75.69	GPA Cr: 22.0	GPA: 3.440		
	UGR-FALL TERM 2018-19					
ENGL	253	SOUTHERN AMERICAN LITERATURE	3.0	3.0	A-	11.01
MUS	110	UNIVERSITY SINGERS	1.0	1.0	A	4.00
MUS	141V	APPLIED MUSIC-VOICE	1.0	1.0	B+	3.33
PHIL	170	INTRO TO LOGIC	3.0	3.0	A	12.00
PHIL	252	PHILOSOPHY OF LAW	3.0	3.0	A-	11.01

(continued in next column)

	COURSE		ATT	COM	GRADE	POINTS
RUSS	111	ELEMENTARY RUSSIAN I	4.0	4.0	A	16.00
THTR	109	UNIVERSITY THEATER	1.0	1.0	A+	4.00
Term	Cmpl Cr: 16.0	GPA Pts: 61.35	GPA Cr: 16.0	GPA: 3.834		
Cumul	Cmpl Cr: 55.0	GPA Pts: 137.04	GPA Cr: 38.0	GPA: 3.606		
	UGR-WINTER TERM 2018-19					
MUS	110	UNIVERSITY SINGERS	1.0	1.0	A	4.00
MUS	241V	APPLIED MUSIC-VOICE	1.0	1.0	A-	3.67
PHIL	105	INTRO KNOWLEDGE & REALITY	3.0	3.0	A	12.00
PHIL	120	MODERN EUROPEAN PHILOSOPHY	3.0	3.0	A	12.00
PHIL	242	SOC INEQUALITY & FAIR OPPORT	3.0	3.0	A-	11.01
RUSS	112	ELEMENTARY RUSSIAN II	4.0	4.0	A+	16.00
Term	Cmpl Cr: 15.0	GPA Pts: 58.68	GPA Cr: 15.0	GPA: 3.912		
Cumul	Cmpl Cr: 70.0	GPA Pts: 195.72	GPA Cr: 53.0	GPA: 3.693		
	UGR-SPRING TERM 2018-19					
PE	155	WEIGHT TRAINING	1.0	1.0	A	4.00
PHIL	272	PHILOSOPHY AND SCIENCE FICTION	3.0	3.0	A-	11.01
Term	Cmpl Cr: 4.0	GPA Pts: 15.01	GPA Cr: 4.0	GPA: 3.753		
Cumul	Cmpl Cr: 74.0	GPA Pts: 210.73	GPA Cr: 57.0	GPA: 3.697		
	UGR-FALL TERM 2019-20					
MUS	110	UNIVERSITY SINGERS	1.0	1.0	A	4.00
MUS	241V	APPLIED MUSIC-VOICE	1.0	1.0	A-	3.67
PE	179	INTERPRETIVE MOVEMNT & FITNESS	1.0	1.0	A	4.00
PHIL	310	KANT	3.0	3.0	B+	9.99
PHIL	372	PHILOSOPHY OF LANGUAGE	3.0	3.0	A	12.00
RUSS	261	INTERMEDIATE RUSSIAN I	4.0	4.0	A	16.00
Term	Cmpl Cr: 13.0	GPA Pts: 49.66	GPA Cr: 13.0	GPA: 3.820		
Cumul	Cmpl Cr: 87.0	GPA Pts: 260.39	GPA Cr: 70.0	GPA: 3.720		

The COVID-19 pandemic required significant academic changes.
Unusual enrollment patterns and grading reflect the disruption of the time, not necessarily the student's work.

(continued on next page)

Registrar

WASHINGTON AND LEE UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
Lexington, Virginia 24450-2116
540.458.8455

Student's Name: Daniel Joseph Wetterhahn
Wetterhahn, Daniel Joseph
Entered: 09/08/2016 as UGR:1ST-TIME 1ST-YR
Major: Philosophy
Other Ed: SOUTH JEFFERSON CENTRAL SCHOOL Adams NY 13605
BA WASHINGTON AND LEE UNIVERSITY Lexington VA 24450

Date Produced: 09/29/2021
Current Program: Undergraduate Class: 2021
Current Status: Graduated 05/27/2021

SSN: ***-**-7929
Student ID: 1730238
Birthdate: 10/06/****

COURSE			ATT	COM	GRADE	POINTS
UGR-WINTER TERM 2019-20						
CBSC	150	PSYCHOACTIVE DRUGS & BEHAVIOR	3.0	3.0	A+	12.00
HIST	221	SOVIET RUSSIA,1917-1991	3.0	3.0	A-	11.01
MUS	110	UNIVERSITY SINGERS	1.0	1.0	A	4.00
MUS	341V	APPLIED MUSIC-VOICE	1.0	1.0	A-	3.67
PE	159	BADMINTON	1.0	1.0	A	4.00
PHIL	228	JOHN STUART MILL	3.0	3.0	A-	11.01
RUSS	262	INTERMEDIATE RUSSIAN II	4.0	4.0	A	16.00
Term Cmpl Cr: 16.0 GPA Pts: 61.69 GPA Cr: 16.0 GPA: 3.856						
Cumul Cmpl Cr: 103.0 GPA Pts: 322.08 GPA Cr: 86.0 GPA: 3.745						
UGR-SPRING TERM 2019-20						
HIST	222	SOVIET UNION FALLS:RUSSIA RISE	3.0	3.0	CR	0.00
HIST	401	CENTRAL ASIA SINCE INDEPENDENC	1.0	1.0	CR	0.00
PE	154	AEROBIC RUNNING	1.0	1.0	CR	0.00
Term Cmpl Cr: 5.0 GPA Pts: 0.00 GPA Cr: 0.0 GPA: 0.000						
Cumul Cmpl Cr: 108.0 GPA Pts: 322.08 GPA Cr: 86.0 GPA: 3.745						
UGR-FALL TERM 2020-21						
DCI	202	INTRODUCTION TO DATA SCIENCE	3.0	3.0	A	12.00
MUS	110	UNIVERSITY SINGERS	1.0	1.0	A	4.00
PHIL	234	AMERICAN PRAGMATISM	3.0	3.0	A	12.00
PHIL	296A	SEM:ETHICS & VALUE THEORY	3.0	3.0	A	12.00
PHIL	493	HONORS THESIS	3.0	3.0	A	12.00
RUSS	301	ADVANCED RUSSIAN I	3.0	3.0	A-	11.01
Term Cmpl Cr: 16.0 GPA Pts: 63.01 GPA Cr: 16.0 GPA: 3.938						
Cumul Cmpl Cr: 124.0 GPA Pts: 385.09 GPA Cr: 102.0 GPA: 3.775						
UGR-WINTER TERM 2020-21						
MUS	110	UNIVERSITY SINGERS	1.0	1.0	A	4.00
PHIL	348	LEGAL ETHICS	3.0	3.0	A	12.00
PHIL	493	HONORS THESIS	3.0	3.0	A	12.00
RUSS	302	ADVANCED RUSSIAN II	3.0	3.0	A	12.00
RUSS	395A	TOPIC:RUSSIAN SOVIET CHILDHOOD	3.0	3.0	A	12.00
Term Cmpl Cr: 13.0 GPA Pts: 52.00 GPA Cr: 13.0 GPA: 4.000						
Cumul Cmpl Cr: 137.0 GPA Pts: 437.09 GPA Cr: 115.0 GPA: 3.801						
UGR-SPRING TERM 2020-21 SPRING OPTION						
INTR	995	SPRING OPTION				

****

UGR-SPRING TERM 2020-21 GRADUATION
BACHELOR OF ARTS 05/27/2021

(continued in next column)

Major: Philosophy
Russian Lang&Cult Minor
cum laude
Honors-Philosophy
Thesis: "More Than Just Victors' Justice: A Defense of the Solely Retributive Character of Atrocity Crime Punishment by International Criminal Tribunals"

****

Cumul Cmpl Cr: 137.0 GPA Pts: 437.09 GPA Cr: 115.0 GPA: 3.801

***** END OF TRANSCRIPT *****

Registrar

UCLA School of Law

BETH A. COLGAN
VICE DEAN OF FACULTY & INTELLECTUAL LIFE
PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 825-6996
Email: colgan@law.ucla.edu

May 4, 2023

Dear Judge:

I write to recommend Dan Wetterhahn for a clerkship in your chambers. Dan was a student in my Constitutional Criminal Procedure: Investigations course during the Fall Semester of 2022. For reasons detailed below, I highly recommend Dan.

Dan has a curiosity about and enthusiasm for understanding the law that will serve him well in a clerkship and beyond. I have designed my course to push students to grapple with the questions and tensions in the doctrine and to assess what arguments are available to both the government and defense. Dan is committed to a career as a prosecutor. Though some students who plan to be prosecutors or defenders find it difficult to do so, Dan seemed to relish the challenge of finding the best arguments on both sides. Further, both during class and in office hours, my discussions with Dan made clear his ability to think creatively about the law while remaining grounded in precedent. I was particularly impressed with his ability to take a step back to see the implications of the doctrine for the real world operation of policing and courts in order to better identify places where arguments might otherwise be missed and where open questions remained.

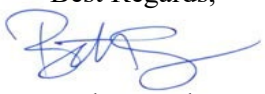
In office hours Dan also exhibited noteworthy characteristics, including diligence and professionalism. Each time he arrived at office hours, he always came prepared with questions he had clearly given thought to in advance, and often with a recent lower court decision on some unresolved area of the doctrine in mind—resulting in some of the most interesting and thought-provoking discussions I've ever had with any student. Other students often participated in these discussions and it was evident that Dan has the respect of his peers, not just because of his earnest interest in the law, but because of his willingness to have his deeply held beliefs challenged, to honestly and seriously consider alternative positions, and to respectfully disagree.

Dan's extracurriculars during his time at UCLA have also helped him develop skills that will be useful throughout his career. In particular, he has been heavily involved in our moot court program and is serving in leadership roles that will help hone his writing, editing, and research skills through the UCLA Criminal Justice Law Review and as a research volunteer through UCLA's El Centro, Labor and Economic Justice Clinic.

Finally, a note on collegiality. I have no doubt that Dan will be a pleasure to work with. Dan has a lovely and warm sense of humor, genuinely enjoys listening to and learning about others, and a courteous demeanor. Should he be lucky enough to serve as a clerk in your chambers, I believe that you and your staff will enjoy his camaraderie.

In short, I believe Dan would be a welcome addition to your chambers. If I can be of further assistance, please do not hesitate to contact me by phone at (310) 825-6996 or by email at colgan@law.ucla.edu.

Best Regards,



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May 3, 2023

Dear Judge:

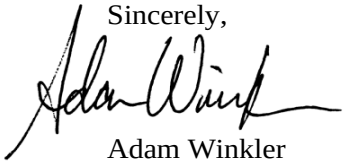
It is a pleasure to recommend Daniel Wetterhahn for a federal clerkship. I have had the pleasure of teaching Daniel in two courses and I can speak to his exceptional abilities as a student and legal thinker. His transcript speaks for itself: all As with a single B+, and a grade point average of 3.86, near the very top of his class; a Masin Family Academic Silver Award for the second highest grade in his Contracts class; and his success on our Moot Court team, which is consistently ranked the best in the nation.

In my Constitutional Law I course, Daniel was an outstanding student who impressed me with his insight and sharp analytical skills. He demonstrated a high level of discipline and dedication to the course, always coming prepared and offering thoughtful insights into the doctrine and constitutional theory. As someone who desires to be a prosecutor, Daniel brought a different perspective from many other students and he was attentive to the criminal dimensions of many of the cases we read. His final examination was excellent and he earned an A in the class.

I had an even better and more in depth opportunity to observe Daniel's skills in my Supreme Court Simulation course. The class is a hands-on, experiential class in which we take cases currently pending before the Supreme Court of the United States and we argue and decide them. The students play the role of justices and advocates, depending on the case, and to excel in the class requires precisely those skills needed by a good judicial clerk: students must prepare for oral argument; think through how to resolve complicated and difficult open questions of law; and write persuasive opinions. And because the students are the ones speaking most of the time, it gives me an unusually good chance to examine how they approach legal problems, reason through them, and deliberate with others. On each of those scores, Daniel was exceptional. As a justice, Daniel came well prepared to every argument and showed his desire to take on the most difficult questions posed by the cases. He was not dogmatic in his thinking and was always open to hearing different viewpoints. As an advocate, he was able to clearly and directly answer questions, explain complicated issues, and think on his feet. His opinion in the case he was assigned to write, *Sackett v. EPA*, was the best in the class: straightforward, careful, smart, and easy to follow. Indeed, he consistently produced high-quality work and showed an impressive level of analytical skill and intellectual curiosity.

I have no doubt that Daniel will make an exceptional federal clerk. His strong work ethic, sharp analytical skills, excellent writing ability, and thoughtful approach to legal reasoning make him an ideal candidate. I highly recommend him. If you have any additional questions or wish to talk through Daniel's candidacy, please do not hesitate to contact me.

Sincerely,



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June 6, 2023

Dear

I very strongly recommend **Daniel Wetterhahn** for a clerkship in your chambers. Dan is an outstanding student whom I've taught in two courses: Contracts and Labor Law. In both of them, he has demonstrated an incisive mind and deep intellectual curiosity.

In Fall 1L Contracts, Dan earned an "A+" grade based on his exam performance in a large 1L section of about 80 students. He was one of only two students who ranked in the top 10 on all three sections of the exam: a set of subtle, technical short-answer questions, a traditional fact-pattern issue-spotter essay, and an essay requiring students to synthesize disparate doctrinal elements that raise a recurring problem and to assess normatively a particular proposed approach to that problem. Dan was also an active and lively contributor to class discussion. On several occasions I noted his particularly sharp comments as a volunteer, including a conceptually sophisticated point where he used the idea of a hypothetical agreement to explain the existence of a contract in a scenario where there was a promise but no mutual assent. Dan was a regular presence in office hours, eager to discuss the underlying policy issues, regardless of whether there was an instrumental connection to exam preparation or the like.

In Spring 2023, I had Dan again in my course on Labor Law & Collective Action. And again, Dan excelled. In a curved class of 65 students, Dan earned an "A" based on the final exam, which consisted of the same three types of question described above for Contracts. On one of the short-answer questions, I made a note that his answer (unlike any other) was not only perfect according to my rubric but so outstanding that it deserved extra credit. On the traditional issue-spotter essay, his answer was among the top handful in the class and stood out as the only one to receive maximum credit for overall quality of writing and analysis; I noted that his answer was exemplary in clarity, structure, and depth. Dan was quieter in this class, but not for lack of engagement; we again had multiple lively conversations outside of class about the subject matter of the course.

In addition to the incisiveness of his own reasoning, Dan has impressed me with his curiosity, open-mindedness, and good-natured approach to disagreement. He has an eagle eye for the weakness in an argument but also the humility to probe it gently and with the awareness that the error might be his own.

All told, Dan Wetterhahn would be an excellent law clerk and a pleasure to have around. Please do not hesitate to follow up if I can answer any questions or address any concerns you might have.

Sincerely,

Noah Zatz

DAN WETTERHAHN
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The attached is an ersatz opinion prepared for a Supreme Court simulation I took in Spring 2023. It is structured to look like a genuine Supreme Court opinion. The opinion is based on the case *Sackett v. EPA* which is currently before the Court. *Sackett* centers on the proper legal test for determining whether the Clean Water Act 33 U.S.C. §§ 1251 *et seq*., applies to a given wetland. If the Clean Water Act does apply to a given wetland, then the wetland's owner must acquire a permit from the appropriate federal agency (the Environmental Protection Agency, or the Army Corps of Engineers) before discharging certain pollutants in the property.

The two proposed tests were derived from a 2006 case, *Rapanos v. United States*, 511 U.S. 738—one from the plurality and one from a concurrence. The plurality test (as advanced by the petitioner) would find Clean Water Act jurisdiction if there was a continuous surface water connection between the wetland and a traditionally navigable waterway. The respondent advanced a test derived from the concurrence which instead would find jurisdiction when there existed a "significant nexus" between the wetland and a traditionally navigable waterway. Ultimately, our simulated Supreme Court agreed with the respondent that the significant nexus test was superior.

The piece is substantially my own work, although it has received minor feedback from classmates and instructors in the simulation.

MICHAEL SACKETT, ET UX., PETITIONERS, *v.* ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 23, 2023]

CHIEF JUSTICE WETTERHAHN delivered the opinion of the Court.

In 1972, Congress enacted the Clean Water Act ("Act"), 33 U.S.C. §§ 1251 *et seq.*, a comprehensive scheme aimed at the "[r]estoration and maintenance of the chemical, physical and biological integrity" of waters of the United States while recognizing and preserving the role of the many States in controlling aquatic pollution. Congress assigned to the Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") the administration and enforcement of the Act not left to the States.

This case concerns the jurisdiction of the EPA to administer a permitting program for certain wetlands per the Act. These wetlands are not themselves traditionally navigable waters—that is those waters that this Court recognizes as at the core of both Federal regulatory power and at the core of the Act. Nonetheless, the health of these wetlands can, and often does, substantially affect the chemical, physical, and biological integrity of core navigable waterways.

The question before us is whether the Ninth Circuit applied the correct test to determine whether the Act covers a given wetland. The Ninth Circuit applied a test derived from a concurring opinion in *Rapanos v. United States*, 511 U.S. 738, 759 (2006) (Kennedy, J., concurring in the judgment), where a wetland is subject to the Act if it is either adjacent to or shares a "significant nexus" with a traditionally navigable water. This nexus requirement is met when a wetland significantly affects the chemical, physical, and biological integrity of that water. Because this test accords with the plain meaning of the Act's text and congressional intent, harmonizes with our precedent, and is more administrable than the alternative, we affirm.

I

In 1996 the Corps surveyed a less than two-thirds-acre lot 300 feet north of Priest Lake in the Idaho panhandle.[1] Between the lot and Priest Lake is a gravel road and set of residential properties, while to the north of the lot lies the paved Kalispell Bay Road. On the far side of the Kalispell Bay Road (relative to

[1] All statements of fact are drawn from the Joint Appendix and the parties' merits briefs. No. 21-454 items 21, 22, and 52.

the lot) a ditch drains the lot and the larger Kalispell Bay Fen into a creek that, in turn, empties into Priest Lake. Shallow subsurface flow connects the lot with the Kalispell Bay Fen, with which it had historically connected before the laying of the Kalispell Bay Road. The Corps concluded that the lot contained wetlands covered by the Act.

Eight years later, Michael and Chantell Sackett, unaware of the jurisdictional determination by the Corps, purchased that two-thirds-of-an-acre vacant lot 300 feet north of Priest Lake. In 2007, without seeking a permit as required for Act covered wetlands, the Sacketts dumped over two thousand tons of sand and gravel into the lot to prepare to build a house. In response to a complaint, Corps and EPA employees inspected and conducted a scientific analysis of the lot. This examination determined that the lot had the physical and biological characteristics of a wetland. These characteristics included wetland soil type, flora, and hydrology. Additionally, the EPA found that the wetland on the lot impacted Priest Lake's water quality by retaining runoff sediment, contributing to the lake's base flow, and helping with flood control. On this basis, the EPA first informed the Sacketts that the wetlands were subject to Act jurisdiction and then later issued an administrative compliance order for their unpermitted filling of the lot. This order instructed the Sacketts to remove the sand and gravel and restore the wetland to its natural status.

The Sacketts sued, eventually resulting in a 2021 decision by the Ninth Circuit Court of Appeals announcing that the Act covered the lot. *Sackett v. United States EPA*, 8 F.4th 1075 (9th Cir. 2021). In reaching its decision, the Ninth Circuit applied a test articulated by Justice Kennedy in a concurrence to a four-Justice plurality in *Rapanos*. *Id.* at 1092. This test finds Act jurisdiction over a wetland when it has a significant nexus with a "traditionally navigable water." *Id.* at 1088. This "significant nexus" inquiry turns on "whether the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. When the court applied this test to the wetland lot owned by the Sacketts, it noted the wetland's subsurface connection with the Kalispell Bay Fen and their shared connection with Priest Lake via the drainage ditch and adjoining creek. *Id.* at 1092. On this basis, the court determined that the wetland had a significant nexus with a traditionally navigable water and thus fell under Act jurisdiction. *Id*.

II

Before the enactment of the Act, Federal regulation of waterways primarily focused on the issue of navigability in keeping with its Article I authority to regulate channels of commerce. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *The Daniel Ball*, 77 U.S. (10 Wall) 447, 563 (1870); *United States v. Standard Oil Co.*, 384 U.S. 224, 226-28 & n.4 (1966). However, in 1972, Congress—still acting within

its Commerce Clause powers—passed the Act to "establish an all-encompassing program of water pollution regulation." *City of Milwaukee v. Illinois*, 451 U.S. 317, 304 (1981). The Act's express goals were to: (1) restore and maintain the "chemical, physical, and biological integrity of the Nation's waters"; and (2) to recognize, preserve, and protect the "primary responsibilities and rights of States" to manage land and water resources. 33 U.S.C. § 1251(a), (b). As one step toward accomplishing these goals, the Act prohibited the unpermitted discharge of pollutants—including fill material like sand and rock—into "navigable waters." 33 U.S.C. §§ 1362(6); 1362(12)(A). "[N]avigable waters," the very core of congressional commerce regulation authority, was broadly defined as "the waters of the United States including the territorial seas." 33 U.S.C § 1362(7). The Act further tasked the Corps and the EPA with administering permitting regimes for different pollutants.

Initially, the EPA and the Corps took different approaches to the jurisdictional question of what qualified as "navigable waters." Notably, the Corps adopted a narrow and restrictive definition. Per the Corps, "navigable waters" were only those waters covered by a pre-existing permitting program authorized by an earlier federal statute concerned exclusively with navigability. However, this approach did not survive judicial review and the Corps adopted a new interpretation of "navigable waters" in line with the definition adopted by the EPA and its "full regulatory mandate." *NRDC, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C, 1975). This new approach asserted Act jurisdiction over (among others) waters including wetlands "adjacent" to traditionally navigable waters and their tributaries. 40 Fed. Reg. 31,320, 31,324 (July 25, 1975). "Adjacent" in turn meant "bordering, contiguous, or neighboring" with both naturally occurring and manufactured barriers such as dikes or berms not defeating adjacency. 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

In 1977, Congress substantially amended the Act, in part to give more responsibilities, such as administering certain pollutant permitting programs, to States and Tribes. 33 U.S.C. §§ 1342(b), 1344(g)(1), 1377(e). However, Congress did not change the definition of "navigable waters" and even explicitly affirmed that the Act covered "adjacent" wetlands. 33 U.S.C. § 1344(f)(1)(A). Congress enacted this revision of the broader Act and affirmation of adjacent wetlands coverage with full knowledge of the Corps' regulatory definition of "adjacent," following extensive inquiry.[2]

[2] *See, e.g.*, *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 38-44, 68-69, 239, 325-326 (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section 404: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. 5-7, 10, 31 (1975).

Moreover, the very subsection of the revised Act that allowed States to issue pollutant permits for some "navigable waters" left to exclusive Federal jurisdiction permitting for other waters "including wetlands adjacent [to navigable waters]."[3] 33 U.S.C. § 1344(g)(1).

After the 1977 revision, the Corps and the EPA adopted parallel regulations defining "adjacent" in the same manner as the Corps had at the time of the congressional inquiries and Act revision. The regulations remained, in the relevant parts, the same from then through the EPA's positive jurisdictional determination of the Sackett lot. 51 Fed. Reg. 41,206, 41,206 (Nov. 13, 1986); 86 Fed. Reg. 69,372, 69,373 & n.5 (Dec. 7, 2021).

III

This Court has previously addressed Act jurisdictional questions arising from definitional disputes bordering, contiguous, or neighboring to the Corps' and the EPA's regulatory understanding of "adjacent." However, these cases are not, by themselves, dispositive of the issue at the heart of this case: what test should be used to determine Act jurisdiction over a wetland.

Most recently, in *Rapanos* we considered Act jurisdiction over wetlands adjacent to certain constructed drainage ditches. A four-Justice plurality opinion authored by Justice Scalia concluded that "adjacent wetlands" in the Act meant only those wetlands with a "continuous surface connection" to traditionally navigable waters. *Rapanos*, 547 U.S. at 742. Thus, human-made barriers, such as paved roads interrupt adjacency and remove wetlands from the scope of the Act. *Id.*

Justice Kennedy wrote a lone concurrence applying a different test; the Act covered adjacent wetlands that had a "significant nexus" to traditional waters. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). Under this significant nexus test, a wetland "possesses the requisite nexus and thus come within the statutory phrase 'navigable waters,' if the wetlands either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

[3] "The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into **the navigable waters (other than those waters** which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, **including wetlands adjacent thereto)**." 33 U.S.C. § 1344(g)(1) (emphasis added).

Because of the fractured judgement in *Rapanos*, the case lacks binding precedential authority for our central issue. To put a finer point on it: we must decide whether the plurality or Justice Kennedy's concurrence provides the right rule for Act jurisdictional determinations over wetlands.

Other cases mark the factual extremes of Act jurisdiction. *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985) provides an edge case where there is certainly Federal jurisdiction. On the other hand, *Solid Waste Agency of North Cook County v. United States Army Corps* ("*SWANCC*"), 531 U.S. 159 (2001), provides an edge case where the Act certainly does not allow Federal jurisdiction. Although the facts and specific holdings of these cases are not dispositive, their frameworks—particularly Riverside *Bayview*'s—can help us resolve this case.

In *Riverside Bayview*, this Court was presented with the question of whether the Corps' (and by implication the EPA's parallel) regulation of a wetland directly abutting a traditional navigable water was permissible under the Act. 474 U.S. at 121. There, the Corps had judged a wetland to be adjacent to a navigable water (and thus under Act jurisdiction) where "one could, after wading through a cattail marsh, swim directly from [that particular wetland] to the Great Lakes." Reply Brief for the United States *United States v. Riverside Bayview Homes, Inc.,* at 2, No. 84-701, 1985 WL 669804 (1985). We unanimously upheld the Corps' jurisdictional determination. *Riverside Bayview*, 474 U.S. at 139. In our analysis we considered the "language, policies, and history" of the Act. *Id.*

Beginning with the language, we acknowledged the although the word "wetlands" does contain "land," it would be too simplistic to consider wetlands to be indistinct from "dry lands" (and thus beyond the scope of the Act) based on this linguistic quirk. *Riverside Bayview*, 474 U.S at 132. "Wetlands" instead fell into the transitional category between land and water, where the Corps (and EPA) would be required to make a jurisdictional judgment call. *Id.* Further, 33 U.S.C. § 1344(g)(1) provided direct support in the text of the statute for the inclusion of wetlands under the Act's scope of "waters of the United States." *Id.* at 138.

Turning to the policies and history of the Act, we acknowledged the importance of Federal jurisdiction over adjacent wetlands in "reasonable proximity to other waters of the United States" because of their necessary role as part of the "aquatic system" in maintaining the chemical, physical, and biological integrity of our waters. *Riverside Bayview*, 474 U.S. at 134 (quoting 42 Fed. Reg. at 37,128). We further observed that Congress had the scope of the Corps' jurisdiction "specifically brought to [its] attention" before amending the Act in 1977. *Id.* at 137. After this, Congress not only refused to diminish the Corps' jurisdiction over adjacent wetlands, it even expressly incorporated "adjacent wetlands" into the term "navigable waters" in 33 U.S.C. § 1344(g)(1). *Id.* at 137, 138. Accordingly, citing *Chevron, U.S.A., Inc.*

v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984), we determined that the Corps had used its specialized knowledge to reasonably construe and apply "adjacent wetlands" and deferred to its judgment. *Id.* at 131.

In *SWANCC*, we addressed whether the Corps had properly exercised Act jurisdiction over outlying ponds visited by migratory birds. 531 U.S. at 159. There, we declined to uphold the Corps' jurisdictional determination because the outlying ponds lacked a "significant nexus" to waters of the United States as traditionally understood, underscoring their geographic remoteness. *Id.* at 167.

IV

In this case, we must decide if the Ninth Circuit applied the correct test when it determined that the wetland lot owned by the Sacketts north of Priest Lake was covered by the Act. We conclude that it did.

The core of this case is the choice between the two conflicting understandings of Act coverage for adjacent wetlands expressed in *Rapanos*. The Sacketts urge we adopt the plurality's "continuous surface connection" test, while the EPA suggests that the significant nexus test from Justice Kennedy's concurrence is the law.

The correct test is the significant nexus test. The significant nexus test accords with the text, policies, and history of the Act; our precedent; and in its administration avoids pitfalls the continuous surface connection test does not.

A

To begin, the significant nexus test directly addresses the primary black letter statutory goal of the Act: restoring and maintaining the "chemical, physical, and biological integrity" of American waters. 33 U.S.C. § 1251(a). The criteria for finding a significant nexus exactly match this goal. That is, a given adjacent wetland is under Act jurisdiction if it significantly affects the "chemical, physical, and biological integrity" of the core waters of congressional concern, *i.e.,* navigable waters. *Rapanos*, 547 U.S. at 759. The direct textual pedigree from the stated goals of the Act ensures that the significant nexus test does not undercut or frustrate the policies the Act was intended to effectuate, which are—at risk of redundancy—safeguarding the chemical, physical, and biological integrity of American waters.

This is in contrast to the continuous surface connection test, whose textual origin is murky and whose application would mire enforcement of the Act in a muck of conflicting State and Tribal rules. To locate the continuous surface connection test in the text of the act requires either ignoring the textual inclusion of "adjacent wetlands" in "navigable waters" found in 33 U.S.C. § 1344(g)(1) or ignoring the dictionary and common, everyday understanding of the word "adjacent."

The text of the statute identifies "adjacent wetlands" as a subset of "navigable waters" and thus waters of the United States and therefore under Act jurisdiction. 33 U.S.C. § 1344(g)(1). The Sacketts argue as a matter of statutory interpretation that parentheticals in statutes are intended to convey afterthoughts or less important terms. Therefore, because "adjacent wetlands" appears as part of a long parenthetical, Congress could not have intended the phrase to carry the semantic weight placed on it by the EPA. This argument appears to be an attempt to apply so-called "no-elephants-in-mouseholes" canon of statutory interpretation, which articulates that Congress does not "typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020). However, the "no-elephants-in-mouseholes" canon is inapposite here. First, there is no elephant. The Act is a comprehensive statutory scheme explicitly aimed at protecting the integrity of American waters. It is not a radical or fundamental expansion of Federal jurisdiction to extend agency pollution permitting schemes to wetlands which, necessarily under the significant nexus test, significantly impact the integrity of core national waters. Second, there is no mousehole. The text in question, although it does straddle a parenthetical, comes directly from a subsection dealing explicitly with the respective responsibilities of Federal agencies and States. 33 U.S.C. § 1344(g)(1). It would be very strange to suggest, as this argument seems to, that Congress accidentally overexpanded Federal power at the expense of the many States in the same provision where it empowered State pollution permitting regimes. Moreover, this subsection was amended into the Act after Congress had conducted extensive investigation of the Corps' administration of its pre-1977 permitting program. If Congress had intended to prevent the Corps (or EPA) from exercising jurisdiction over wetlands adjacent to traditionally navigable waters, it could have done so. Instead, it explicitly confirmed that the Corps' permitting program applied to "adjacent wetlands" as a subset of "navigable waters." *Id*. Thus, the Act unambiguously confirms EPA jurisdiction over "adjacent wetlands."

For the continuous surface connection test—which requires wetlands to have a continuous surface water connection to traditionally navigable waterways—to be congruent with the text Act, "adjacent" must narrowly mean contiguous or abutting. However, this is not the case. Neither the dictionary definition nor the everyday plain meaning of "adjacent" are constrained to just contiguous or abutting. *Black's Law Dictionary* takes "adjacent" to mean "[l]ying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, **though they may not actually touch.**" *Black's Law Dictionary* 62 (rev. 4th ed. 1968) (cleaned up emphases changed).[4] The everyday use of "adjacent" is similarly unconstrained. No one would misunderstand, or even find odd, a speaker saying

[4] *See also*, *The American Heritage Dictionary of the English Language* 16 (1975) ("Close to; next to; lying near; adjoining."); *Webster's New International Dictionary of the English Language* 32 (2d ed. 1958) ("Lying near, close, or contiguous; neighboring; bordering on.") (emphasis omitted).

they grew up in an apartment building adjacent to their best friend's building when the two buildings were on opposite sides of a street or were divided by an alley. Thus, the continuous surface connection test does not accord with either the text of the Act or with the plain meaning of "adjacent."

The Sacketts also argue that federalism concerns should restrain the application of the Act to only those wetlands with a continuous surface water connection to traditionally navigable waterways. These concerns are misplaced. The Act takes great care to respect the traditional spheres of States and Tribes in pollution regulation; it is its second stated goal of the legislation. 33 U.S.C. § 1251(b). Congress achieved this goal by, among other mechanisms, assigning permitting responsibilities of some wetlands to States in the same section of the Act where it assigned to a Federal agency jurisdiction over "adjacent wetlands." 33 U.S.C. § 1344. Nor does the significant nexus test in itself extend congressional power unconstitutionally. In addition to the built in federalism guardrails of the Act (the second statutory goal and the State permitting programs), the significant nexus test restricts Federal jurisdiction to wetlands where there is a significant Federal interest by design. That is, it restricts jurisdiction to wetlands only if they significantly affect the waters over which Congress has unquestioned Article I authority: the very channels of interstate commerce, navigable waters. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 558 (1995); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

Finally, concern that certain language in the significant nexus test invites overreach is misplaced. The test provides that the wetlands must have a significant effect "either alone or in combination with similarly situated lands in the region." This language, properly understood, simply prevents wetlands that lack any nexus with a traditionally navigable water to be lumped in with wetlands that do possess the requisite nexus. This part of the test merely ensures that the Act is comprehensively administered. Without it, a jurisdictional gap could emerge, with Federal permitting programs excluding small lots with meaningful connections to traditionally navigable waters. These small lots by definition do not in themselves *significantly* affect navigable waters because of their size, but nonetheless are within the proper scope of the Act. In other words, each piece of a wetland must itself have a meaningful effect on a traditionally navigable water, even if that effect is not in magnitude significant until considered as part of a wetlands feature as a whole.

B

The significant nexus test harmonizes with our existing precedent in both *Riverside Bayview* and *SWANCC*.

Although it is true that both proposed tests would result in the same holding in *Riverside Bayview*, the significant nexus test better matches the methodology we used to get there. We unanimously upheld

the jurisdictional determination there not by engaging in simple surface tracing but instead by examining the "language, policies, and history" of the Act. *Riverside Bayview*, 474 U.S. at 139. This process turned on an understanding that to effectuate the goals of the Act—chiefly restoring and maintaining the chemical, physical, and biological integrity of the nation's waters—Congress necessarily authorized the regulation of at least some non-dry-land, non-traditionally-navigable-water natural features, such as wetlands, by administering agencies. *Id.* at 134. This was because of the significant impact that those features, including wetlands, have on the integrity of the broader "aquatic system." *Id*. Thus, our method matched the analysis required by the significant nexus test; we found a neighboring wetland to be under Act jurisdiction precisely because of its import to other waters and its importance in the broader statutory scheme.

SWANCC is also best explained by the significant nexus test. Isolated ponds do not significantly impact traditional navigable waters just because they both may be visited by migratory birds. Our analysis explicitly addressed the importance of finding a "significant nexus" between a wetland and a traditionally understood water of the United States. *SWANCC*, 531 U.S. at 167. Because the outlying ponds were geographically remote, they lacked a significant impact on the chemical, physical, and biological integrity of waters traditionally understood to be navigable—the waters of the United States. Although it is true that the continuous surface connection test would reach the same holding, once again, our reasoning maps to the significant nexus test.

C

Finally, the significant nexus test is better in function than the continuous surface connection test. Determining which wetlands might affect the integrity of the waters of the United States will be a gritty, fact intensive inquiry best handled by agencies with specialized scientific and technical knowledge. Judges are not well positioned to second guess these decisions and should not resort to arbitrary line drawing to do so. *See Chevron*, 467 U.S. at 837. Nor is the complexity or factor-driven character of the test a barrier to its smooth implementation. The EPA and the Corps have successfully operated with regulations consistent with the significant nexus test for 45 years. Moreover, we recently upheld a similarly sophisticated factor test in the context of the Act in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). We trust both executive agencies and Federal judges to apply the significant nexus test fairly and competently.

To hold otherwise would invite counterintuitive jurisdictional conclusions and potentially undermine the ability of the Act to comprehensively regulate pollution of the nation's waters. For instance, under the continuous surface connection test, a wetland separated from the Mississippi river by a human erected levee or raised highway would no longer be under Act jurisdiction. This would mean that Federal agencies like the EPA would be helpless to prevent despoilment of such a wetland despite full knowledge

that it and the Mississippi could be extensively connected by subsurface flow, or that its infill would harm the ability of the Mississippi to withstand flood pressures. This would discourage Federal waterway management for fear of cutting off their own jurisdiction. For example, if the Corps sees that a levee is needed for flood control reasons between a continuously-surface-connected wetland and a traditionally navigable water it would face a dilemma. Either it must not build the levee or it must surrender its power to protect the integrity of a core water of the United States through preventing the infill and pollution of the wetland. Or, to take another example, a continuous surface water connection between a wetland and a navigable water could be present all but two weeks out of the year but naturally disappear because of lowered water levels during the height of summer. It is clear under the significant nexus test whether and when the EPA has jurisdiction, but under the continuous surface connection test it is not. The significant nexus test handles cases easily where the continuous surface connection test just gets stuck in the mud.

Nor does the complexity of the test present a potential pitfall to innocent-minded property owners. First, the Corps will provide a jurisdictional determination to a property owner for free. Second, a positive jurisdictional determination only means that a given lot is subject to Federal permitting, not that it is necessarily a no-build site. If a property owner is dissatisfied with either a jurisdictional determination or a permitting decision, they can use the internal appeal mechanisms of the permitting agencies to seek a different outcome.

V

The Ninth Circuit was right to apply the significant nexus test to the wetland lot in this case. The significant nexus test is the correct statement of the law and the Ninth Circuit correctly applied the test to the facts of this case. The record showed that the wetland lot and the larger Kalispell Bay Fen drained via subsurface flow north of Kalispell Bay Road into a creek emptying into Priest Lake. Thus, the lot had adjacency to a navigable water (Priest Lake) via the creek's tributary. The presence of an artificial barrier such as the Kalispell Bay Road did not defeat adjacency. Further, due to its role in retaining runoff sediment, helping with flood control, and contributing to Priest Lake's base flow; the wetland had a significant effect on the chemical, physical, and biological integrity of a traditionally navigable waterway. The lot therefore was adjacent to and had a significant chemical, physical, and biological effect on traditionally navigable water. This was sufficient to establish the requisite significant nexus. Thus, the EPA had jurisdiction per the Act over the Sackett's wetland lot.

We therefore *affirm* the judgment of the Court of Appeals.

JUSTICE ------- took no part in the consideration or decision of this case.

Applicant Details

First Name	**Emma**
Last Name	**Wexler**
Citizenship Status	**U. S. Citizen**
Email Address	**wexler2024@lawnet.ucla.edu**
Address	**Address** **Street** **71 Hancock st** **City** **San Francisco** **State/Territory** **California** **Zip** **94114** **Country** **United States**
Contact Phone Number	**4156806602**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**December 2018**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 14, 2024**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Journal of Law and Technology**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Malloy, Timothy
Malloy@law.ucla.edu
(310) 794-5278
Horwitz, Jill
horwitz@law.ucla.edu
Wetzstein, Sarah
wetzstein@law.ucla.edu
310 206-1093

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Emma Ackerman Wexler

415.680.6602 | wexler2024@lawnet.ucla.edu | 71 Hancock Street, San Francisco, CA 94114

June 5, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510-1915 United States

Re: Judicial Clerkship Application

Dear Judge Walker:

I am a rising third-year law student at UCLA School of Law and I would be honored to clerk in your chambers starting fall of 2024. Last summer, I enjoyed my judicial externship at the U.S. District Court for the Northern District of California and would like to build upon this experience as a judicial clerk. I believe a judicial clerkship will be a meaningful way to begin a career of public service working for the federal government. I am interested in spending time in Norfolk, Virginia because I would like to experience a different part of the country and explore the coast and nature in the surrounding area.

Going into law school, I knew that I wanted to work in policy, lawmaking, or government after graduation. During my summer judicial externship in the U.S. District Court for the Northern District of California, I gained a deeper appreciation for federal law and found it compelling to see the impact the judicial system could have in administering justice. While drafting bench memoranda for the court, I strengthened the legal research and writing skills. Judge Corley's clerks commended my ability to draft a coherent bench memorandum based on the judge's initial impressions of the case, and Judge Corley even told me that my written work product was of the highest quality and ranked in the top percentage of her previous summer externs.

Not only did I succeed at my judicial externship last summer, but I thoroughly enjoyed researching complex topics and analyzing how to best apply the law to a specific case. I have always thrived in a problem-solving setting. Analytical thinking was also my favorite part of my previous job in market research consulting and my Behavioral Decision Sciences major at Brown University. I am excited by the opportunity to be your law clerk because I will be able to learn more about the law through creative and analytical thinking while participating in the interaction between the law and the public.

This year, inspired by my Administrative Law, Public Health Law, and Environmental Aspects of Business Transactions courses, I solidified my interest in working in a federal government agency. I have further practiced and sharpened my writing skills as an Articles Editor on the Journal of Law and Technology. Additionally, I am honing my professional legal skillset this summer at a Summer Associate at Wilson Sonsini Goodrich & Rosati. I believe that clerking will be the perfect opportunity to gain exposure to federal law, experience working for the U.S. Government, and demonstrate my commitment to public service.

In sum, I believe that I possess the necessary skills to successfully assist you as a law clerk. Enclosed please find a copy of my resume, transcript, writing sample, and letters of recommendation from Professor Wetzstein, Professor Malloy, and Professor Horwitz for your review. I appreciate your consideration for this clerkship and look forward to hearing from you soon.

Sincerely,

Emma Wexler

Emma Ackerman Wexler

415.680.6602 | wexler2024@lawnet.ucla.edu
71 Hancock Street, San Francisco, CA 94114

EDUCATION

UCLA School of Law, Los Angeles, CA
J.D. Candidate, May 2024

GPA:	3.59
Honors:	Masin Family Academic Excellence Gold Award in Nonprofit Law and Policy Battle for the Gavel Soccer Champion Against USC Law
Activities:	Journal of Law and Technology, *Chief Articles Editor* Health Law Society, *Board Member* El Centro Education Rights Clinic, *Volunteer*; If/When/How, *Member*

Brown University, Providence, RI
B.A. in Behavioral Decision Sciences, December 2018

Leadership:	Behavioral Decision Sciences Department Undergraduate Group, *Co-President & Co-Founder* Brown Women's Club Soccer, *Captain* ENGN0090 Management of Industrial and Non-profit Organizations, *Teaching Assistant*
Capstone:	*Who at Brown University Feels Qualified to Run for Office? Discovering a Gender Gap*
Study Abroad:	Vesalius College, Brussels, Belgium, Fall 2016

EXPERIENCE

Wilson Sonsini Goodrich & Rosati, San Francisco, CA May 2023 – July 2023
Summer Associate

United States District Court for the Northern District of California, San Francisco, CA May 2022 – July 2022
Judicial Extern to Judge Jacqueline S. Corley

- Performed legal research and drafted bench memoranda on topics including a motion to vacate, a subpoena request, a motion to dismiss, and an appointment of a legal guardian
- Observed district court trials, pre-trial hearings, and motions and discussed observations with the Judge

Lieberman Research Worldwide, Los Angeles, CA March 2019 – June 2021
Research Manager, November 2020 – June 2021
Research Associate, March 2019 – April 2020

- Managed execution of quantitative and qualitative studies by creating project timelines, writing questionnaires, overseeing data collection, analyzing data tables, and creating final report deliverables for clients
- Leveraged advanced analytic tools and research to provide solutions to clients' key business questions
- Managed accounts and financials to ensure clients were satisfied within the scope of projects

Dave Fromer Soccer, Mill Valley, CA
Soccer Coach October 2020 – January 2021

- Led practices twice a week to teach children basic soccer skills and fitness
- Engaged in teambuilding games to inspire children's love for physical activity

SKILLS & INTERESTS

Technical Skills: Westlaw, LexisNexis, Python, SPSS, Qualtrics, Salesforce, Advanced Microsoft Excel
Certificate: IBM Professional Certificate in Data Science
Interests: Political podcasts | Soccer | Coffee tasting | Teaching math

University of California, Los Angeles
LAW Student Copy Transcript Report

Student Information

Name:	WEXLER, EMMA A
UCLA ID:	105713593
Date of Birth:	01/27/XXXX
Version:	08/2014 | SAITONE
Generation Date:	June 02, 2023 | 04:34:58 PM This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/23/2021

SCHOOL OF LAW

Major:
LAW

Degrees | Certificates Awarded

None Awarded

Graduate Degree Progress

PR COMPLETED IN LAW 312, 22F

Previous Degrees

None Reported

California Residence Status

Resident

Fall Semester 2021

Major:
LAW

CONTRACTS	LAW 100	4.0	14.8	A-
INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP
Multiple Term - In Progress				
PROPERTY	LAW 130	4.0	13.2	B+
CIVIL PROCEDURE	LAW 145	4.0	12.0	B

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	40.0	3.333

Spring Semester 2022

LGL RSRCH & WRITING	LAW 108B	5.0	18.5	A-
End of Multiple Term Course				
CRIMINAL LAW	LAW 120	4.0	13.2	B+
TORTS	LAW 140	4.0	14.8	A-
CONSTITUT LAW I	LAW 148	4.0	13.2	B+
LGBT LAW AND POLICY	LAW 165	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	59.7	3.512

Fall Semester 2022

BUSINESS ASSOCIATNS	LAW 230	4.0	13.2	B+
PROFESSIONAL RESPON	LAW 312	2.0	6.6	B+
JOURNAL LEADERSHIP	LAW 347	1.0	0.0	P
NONPROFIT LAW & POL	LAW 363	4.0	17.2	A+
INTL COMPRTV SPORTS	LAW 432	3.0	12.0	A

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	49.0	3.769

Spring Semester 2023

ADMINISTRATIVE LAW	LAW 216	3.0	9.9	B+
INTRO FED INCOME TX	LAW 220	4.0	16.0	A
PUBLC HLTH LW & POL	LAW 442	3.0	9.9	B+
HLTH SCHOLAR WRKSHP	LAW 512	1.0	4.0	A
ENVIRON BUS TRANS	LAW 741	4.0	16.0	A
CYBERSECURITY	LAW 962	1.0	3.7	A-

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	59.5	3.719

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	3.0	3.0	N/a	N/a
Graded Total	58.0	58.0	N/a	N/a
Cumulative Total	61.0	61.0	208.2	3.590

Total Completed Units 61.0

Memorandum

Masin Family Academic Gold Award
NONPROFIT LAW & POL, s. 1, 22F

END OF RECORD
NO ENTRIES BELOW THIS LINE

UCLA School of Law

TIMOTHY F. MALLOY
PROFESSOR OF LAW
FACULTY DIRECTOR, UCLA SUSTAINABLE TECHNOLOGY AND POLICY PROGRAM

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 794-5278
Email:Malloy@law.ucla.edu

The Honorable «Full_Name»
«Court_General»
«Court_Specific»
«Street1»
«Street2»
«Street3»
«City», «State» «Zip»

Dear «Salutation» «Last_Name»:

I am writing with respect to Emma Wexler, who is applying to you for a clerkship position. Ms. Wexler has been in two of my classes at UCLA. In the Fall of 2021 semester, she was in my Contracts class. That class was relatively small for a first year doctrinal course—about forty people. My Environmental Aspects of Business Transactions class, which she took in Spring of 2023, had an enrollment of sixteen second- and third-year law students, providing me an even greater opportunity to get to know her well. Based on my experiences in those classes, I recommend her to you enthusiastically.

Ms. Wexler is a very strong student. She received an A- in Contracts and an A in Environmental Business Transactions. In addition to her capacity for careful, critical thought, she has the ability to keep an eye on the practical implications of her arguments. My Contracts class covers common law, statutory law in the form of the Uniform Commercial Code (UCC), and policy. It is an intense class, with heavy focus on classroom interaction and on-the-ground application of law and policy. Our exploration of the UCC is particularly challenging for many students. Ms. Wexler was an active participant in class, well prepared whether she volunteered or I "cold-called" her. I look for several things in students, including strong understanding of the doctrines, capacity to deal with uncertainty and ambiguity in the law and the facts, and the ability to deal with underlying policy issues. She exhibited remarkable proficiency in each and was undaunted by the complexities of the UCC.

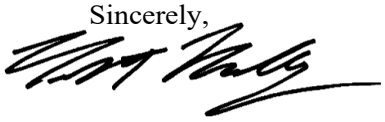
My Environmental Aspects of Business Transactions class uses an extensive, semester long, complex simulation of the sale of a chemical plant to teach transactional strategies and skills. This "experiential" course introduces students to sophisticated lawyering in the transactional context. The course is designed to engage students at the doctrinal, practical, and strategic levels. The class size allowed me to meet individually with each student regularly throughout the semester to discuss written assignments performed as part of the class. I also watch and critique videos of two two-hour negotiation sessions of each student over the course of the semester. Ms. Wexler's performance in the business transactions course was absolutely terrific. She excelled in a variety of skills, including technical drafting, oral communication, and

strategic analysis. She also collaborated well with a variety of negotiation partners and engaged thoughtfully and enthusiastically in our in-class discussions regarding ethics, negotiation theory, and substantive environmental law and regulation.

From my interactions with Ms. Wexler, she has the intellectual capacity and commitment needed to excel as a law clerk. From my discussions with her outside of class, I believe that her background and experience will enable her to manage challenging workloads and engage with and communicate difficult concepts and analyses. Her writing, which I saw extensively in both courses, is top-notch, whether drafting an objective legal memorandum, a client letter, or an indemnification. Having clerked myself (albeit some years ago) I understand what is required of judicial law clerks, and I am confident that she has the ability and the desire to be a terrific one.

If you have any questions, please do not hesitate to contact me via e-mail at malloy@law.ucla.edu.

Sincerely,



Timothy F. Malloy

UCLA School of Law

JILL R. HORWITZ, PH.D., J.D., M.P.P.
DAVID SANDERS PROFESSOR OF LAW AND MEDICINE
FACULTY DIRECTOR, PROGRAM IN PHILANTHROPY AND NONPROFITS

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-1577
Email: horwitz@law.ucla.edu

May 12, 2023

The Honorable «Full_Name»
«Court_General»
«Court_Specific»
«Street1»
«Street2»
«Street3»
«City», «State» «Zip»

Dear «Salutation» «Last_Name»:

I am writing to recommend Ms. Emma Wexler for a clerkship in your chambers. In short, Emma is a serious thinker, an extremely hard worker, and a delightful person. I recommend her enthusiastically.

I have had the pleasure of teaching Emma in two courses. First, she was a student in my Nonprofit Law and Policy course last semester, Fall 2022. The course covers a wide range of material, including both substantive state statutory and common law as well as the tax law of exempt organizations. At the start of the course, it was easy to overlook Emma because she was relatively quiet. Occasionally she would raise her hand, but in a class of quite vocal students she would mostly wait to be called on. After the first few weeks, however, Emma stood out. The students must complete a range of assignments during the course, written and oral. Her written work, largely in the form of short essays, put her at the very top of the class. They were not only the most sophisticated papers in terms of argument, but they were beautifully written. In addition, given Emma's contributions I began to call on her to answer particularly difficult questions. Her answers revealed not only that she had understood the material, but that she had thoroughly prepared and thought about the material in context, so much so that she must have performed even further research on the questions we were discussing. I seldom give an A+ in an upper-level course. Hers was well deserved.

Second, Emma was a student in my health law workshop this semester, Spring 2023. The course is unconventional for a law school class. Over the semester, several scholars present unpublished works in progress. The students prepare for those sessions by reading related scholarship, presenting the faculty presenter's work in class the week before the workshop, and leading discussions. They then write referee reports on the presenter's draft. Every piece of her work was extremely insightful and polished. It was her engagement with the faculty speakers, however, that made her stand out. She offered fully professional comments on every single paper,

including a quantitative paper by an economist writing about a legal issue. She made her comments respectfully and with quiet authority. Each speaker noticed.

A final sign of my high regard for Emma is that I have asked her to serve as a Research Assistant next year on a funded research project. Most of our students researchers work for professors under the supervision of a librarian. In this case, Emma will be working directly for me. She is smart, resourceful, and responsible enough to do the work with little supervision.

Finally, Emma's transcript is just fine, but not at the top of the class. I think she struggled to get her footing in law school, particularly early on. She is also not competitive. Whereas a student of her talents would study only with the highest achieving students, I have seen Emma tutor classmates who struggle. She is kind and generous.

I hope you will give Emma the opportunity to work for you. Please contact me if I can supply any more information to assist her candidacy.

Very truly yours,

Jill R. Horwitz

UCLA School of Law

SARAH R. WETZSTEIN
LECTURER IN LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-1093
Email: wetzstein@law.ucla.edu

June 3, 2023

Dear Judge:

I am writing to highly recommend Emma Wexler for a clerkship in your chambers. Emma was a student in my Legal Research and Writing class at the UCLA School of Law during her first year of law school, and I had the pleasure of getting to know her in that context.

At UCLA Law, Legal Research and Writing is a demanding, year-long, five-credit course. When Emma was in my class, my students completed three ungraded writing assignments, five ungraded research assignments, two graded writing assignments (one objective and one persuasive), and one graded research assignment. I also required my students to participate in numerous ungraded exercises. My evaluation of Emma is based on her performance on written assignments, her participation in class discussions and on exercises, and my individual meetings with her.

Emma was a strong Legal Research and Writing student from the start. She arrived at law school with excellent writing skills and, unlike many students, made the transition to legal writing smoothly. Legal analysis seems to come naturally to Emma, who reads carefully and thinks analytically. She is also a skilled and thorough researcher who enjoys the problem-solving aspect of legal research.

As a results of these skills and others, Emma turned in high-quality, polished work all year. Her fall graded writing assignment—an objective memo relating to the potential misappropriation of an alleged trade secret—was a particular highlight as she received the second highest score in her section of 25 students.

Additionally, Emma was a positive member of our classroom community. She set a good example for others by coming to class on time and prepared and by participating appropriately in class discussions and exercises. Emma worked well in groups and seemed to be well-liked by her peers.

She also attended office hours regularly, sometimes to dig more deeply into material we covered in class or to ask questions about an assignment and other times to talk through career related questions. I enjoyed engaging with Emma in this way and was impressed with her thoughtful and deliberate approach to both her work for our class and her career planning.

Emma stayed in touch after our class ended. Among other things, we discussed her summer job interview process and opportunities, her 2L classes, and her career related plans and goals. When Emma began to consider seeking a clerkship, I encouraged her to apply not only because I believe clerking would be a great experience for Emma, but also because I am confident that Emma would be a terrific clerk. The same traits and skills that have served Emma well as a law student will also serve her well as a clerk. She is intelligent, hard-working, steady, and mature.

If I can provide any additional information about Emma as you consider which candidates to interview and hire, please do not hesitate to ask. As I hope I have made clear, I believe that Emma would be a fantastic choice.

Sincerely,

Sarah R. Wetzstein
Lecturer in Law
UCLA School of Law

Emma Wexler
71 Hancock Street
San Francisco, CA 94114
wexler2024@lawnet.ucla.edu
(415) 680-6602

Writing Sample

I drafted the following memorandum as an extern for Judge Jaqueline Corley in the Northern District of California. The memorandum references a case that was transferred from the Western District of Texas to Judge Corley. In the document, I recommend that Judge Corley deny a motion to vacate the transfer order in part.

The memorandum represents substantially my own work with some editing by my law clerk supervisor. Judge Corley gave me permission to use this writing sample.

MEMORANDUM

To: Judge Corley
From: Emma Wexler
Date: May 27, 2023
Re: Motion to Vacate in Part
Recommendation: DENY

Defendant seeks to vacate in part an order transferring this case to the Northern District of California. (Dkt. No. 97.) Plaintiff filed a complaint against Defendant in the Western District of Texas ("WDTX") for patent infringement. (Dkt. No. 1.) The court granted Defendant's motion to transfer to this District. (Dkt. No. 82.) The Transfer Order included a credibility finding about Defendant's declarant. (*Id.*) Defendant does not contest the transfer but seeks to vacate the portion of the Transfer Order which included the credibility finding. (Dkt. No. 97.) I recommend you DENY Defendant's motion to vacate in part.

BACKGROUND

Plaintiff sued Defendant in the WDTX for patent infringement. (Dkt. No. 1.) Defendant filed a motion to transfer to this District for convenience under 28 U.S.C. § 1404(a). (Dkt. No. 37.) In support of its motion, Defendant filed a declaration by Defendant's Finance Director which stated that relevant witnesses reside in the Northern District of California; San Diego, CA; and Auckland, New Zealand. (*Id*; Dkt. No. 82.) Plaintiff opposed the motion and identified other potential witnesses located in Austin, TX, and other locations outside of California or Texas. (Dkt. No. 67.; Dkt. No. 82.) In response, Defendant submitted a second declaration by the Finance Director in which he refuted Plaintiff's statements about potential Texas witnesses. (Dkt. No. 72; Dkt. No. 82.)

The transfer court found the convenience transfer factors weighed in favor of transfer to the Northern District of California and granted Defendant's motion. (Dkt. No. 82.) However, the Transfer Order also included a finding that Defendant's declarant lacked credibility. (*Id.* at 3.)

Because both motions were filed under seal, the transfer court issued its order under seal and allowed the parties one week to submit redactions. (Dkt. No. 97 at 11.) The parties jointly asked for an eight-day extension which the court denied. (*Id.*) Defendant filed its proposed redactions seeking to redact the WDTX Court's unwarranted and false statements about the declarant and one item of confidential business information. (Dkt. No. 80-1.) At the same time, Defendant filed a motion to seal the Transfer Order to prevent irreparable harm to Defendant and the declarant from the WDTX Court's false statements. (Dkt. No. 83.) Defendant requested full briefing on the matter and asked to keep the material under seal pending resolution of the motion to seal (and any subsequent appeal). (*Id.*) The transfer court denied Defendant's motion to seal without a hearing and published the order with the credibility finding and only one piece of business information redacted. (Dkt. No. 82)

Defendant filed a motion to vacate in part the Transfer Order, which is now before this Court. (Dkt No. 97.) Specifically, Defendant seeks to vacate the finding on the declarant's credibility. (*Id.*) Plaintiff filed an opposition to which Defendant replied. (Dkt. No. 106; Dkt. No. 108.)

LEGAL STANDARD

A district court in its discretion may revisit prior interlocutory decisions entered by another judge in the same case for cogent reasons or in exceptional circumstances. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532-33 (9th Cir. 2000). Such circumstances occur because "ultimately the judge who enters the final judgment in the case is responsible for the legal sufficiency of the ruling and is the one that will be reversed on appeal if the ruling is found to be erroneous." *Id.* at 530. A cogent reason or exceptional circumstance can occur where the second judge believes a decision by a judge in an earlier order is legally improper or that error in a previous decision would cause a useless trial. *Castner v. First Nat'l Bank of Anchorage*, 278 F.2d 376, 380 (9th Cir. 1960). Though this framework applies to interlocutory orders after transfer, courts have employed it when considering a challenge to a Transfer Order, but as far as

I am aware none have found exceptional circumstances for doing so. *See Columbia Sportswear N. Am., Inc. v. Seirus Innovative Accessories, Inc.*, No. 20-CV-709 JLS (JLB), 2021 WL 230029, at *6 (S.D. Cal. Jan. 22, 2021) (collecting cases).

DISCUSSION

Defendant asks this Court to exercise its discretion and revisit the Transfer Order. However, this Court should not do so. First, Defendant's motion is procedurally improper because: (1) there is no legal support for vacating part of the Transfer Order; and (2) Defendant's objection to the Transfer Order is not something that Defendant could raise on appeal. Second, this case is not an exceptional circumstance in which a court should revisit a prior interlocutory order.

A. Defendant's Motion is Procedurally Improper

As a threshold matter, Defendant's motion to vacate an order on a motion for which it was the prevailing party because it disagrees with some of the conclusions is procedurally improper. First, the Court cannot vacate just a part of the reasoning on an order. And second, Defendant cannot appeal the Transfer Order.

1. No Legal Basis to Vacate Dicta

Defendant seeks to vacate the part of the Transfer Order which finds the declarant lacks credibility. (Dkt. No. 97.) To do so, Defendant treats the credibility finding as separate from the ultimate holding to transfer. (Dkt. No. 108 at 8.) However, Defendant provides no legal support for its argument that the credibility finding is a separate legal judgment. Instead, Defendant encourages an inference that because the credibility finding played almost no role in the substantive analysis, it is a separate finding. For example, Defendant contends "the credibility finding played almost no role in the substantive transfer analysis and, in fact, contravened the ultimate outcome… the Transfer Order would have come out in [Defendant's] favor with or without the credibility finding." (Dkt. No. 97 at 17-8.)

The credibility finding, however, is not a legal judgment, but rather dicta. Though the credibility finding had minimal influence on the analysis, it was still part of the court's

reasoning. The transfer court used the credibility finding as support for the choice to "credit [the defendant's] declaration only for its unrebutted statements." (Dkt. No. 82 at 3.) Thus, though the credibility finding is dicta since the transfer court would have decided to transfer without it, the credibility finding is still a part of the reasoning in the order and not a separate finding. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (defining a statement as "dictum" where it is made during the course of delivering a judicial opinion but is unnecessary to the decision in the case and is therefore not precedential.)

Defendant provides no legal support for its argument that the Court can vacate reasoning in a decision but leave the ultimate holding intact. However, though this Court cannot vacate the credibility finding, it is under no obligation to credit the finding as true and should not do so.

2. The Credibility Finding Is Non-Appealable

Defendant cannot appeal the Transfer Order at this time. An order to transfer is an interlocutory order which is not appealable prior to final judgment. *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949 (9th Cir. 1968). Thus, because the credibility finding is part of the Transfer Order, Defendant cannot appeal the order prior to final judgment.

Defendant cannot appeal even after final judgment. A party may not appeal from a judgment in its favor for the purposes of obtaining review of findings which are immaterial to the disposition of the case. *Envtl. Prot. Info. Center, Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001). Here, the Transfer Order found in Defendant's favor, but Defendant still seeks review of the credibility finding. To vacate the credibility finding is more like performing a line edit of the Transfer Order than reviewing a case on the merits. *See Melendres v. Maricopa Cnty.*, No. 16–16659, 2017 WL 4317167 at *1 (9th Cir. July 27, 2017) (holding the Ninth Circuit will not line-edit a district courts' opinion.) Thus, Defendant cannot appeal just to remove the credibility finding from the Transfer Order.

Even if Defendant were to find grounds to appeal, the Ninth Circuit would review the overall finding, not the reasoning. If the WDTX came to the proper legal conclusion for erroneous reasons, the Ninth Circuit would affirm the conclusion regardless of that reasoning and

would likely not rule on the erroneous nature of the prior order. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1213 (9th Cir. 2019). Thus, if Defendant's purpose is only to vacate in part the credibility finding, there would be no reason to appeal.

B. This Court Should Not Revisit the Transfer Order

Even if the Court were to overlook these procedural bars to Defendant's motion, there is no basis to exercise your discretion and vacate the credibility finding in the Transfer Order. Although Defendant contends this is an exceptional circumstance in which the Court may revisit a prior interlocutory order, it has not met its burden of demonstrating that such relief is warranted. (Dkt. No. 108 at 9.)

1. This is not an Exceptional Circumstance

Exceptional circumstances occur where the Court to which a case was transferred believes either a prior order was legally improper or the prior order had an error that would make the trial useless. *Fairbank* 212 F.3d at 532-33. Here, the convenience factors weighed in favor of transfer and the court correctly ordered transfer. Thus, there was no legal error in the Transfer Order.

Defendant argues that the credibility finding was erroneous and its existence in the Transfer Order will render the trial unfair. A court may find an exceptional circumstance where it is ultimately responsible for the legal sufficiency of the ruling. *Id.* at 530. Though the credibility finding may be erroneous, it is dicta and not a legal judgment. The legal judgment was the decision to transfer, not the reasoning the court to get there. Because the decision to transfer was correct, there is no erroneous legal decision for this Court to revisit. Thus, error in the credibility finding is not reason for this Court to revisit the Transfer Order.

Additionally, an erroneous credibility finding will not cause an unfair trial. Defendant worries that if the credibility finding stands, Plaintiff will use it to discredit the declarant as a witness at trial. (Dkt. No. 97 at 17-18.) However, the Transfer Order is a pretrial order which will not have an impact on the trial. Similarly, because the credibility finding is dicta, it will not be

admitted as evidence at trial. *See Cetacean Cmty.*, 386 F.3d at 1173. The Transfer Order will not in any way render the trial unjust, thus, there is no reason to revisit the Transfer Order.

2. Defendant's Proposed Law-of-the-Case Doctrine Does Not Apply

Instead of the cogent reasons or exceptional circumstances standard, Defendant argues that law-of-the-case principles apply here. "Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (cleaned up). *U.S. v. Alexander* provides a limited set of reasons a court can depart from the law of the case, including (1) the first decision was clearly erroneous; (2) the evidence on remand is substantially different; or (3) a manifest injustice would otherwise result. 106 F.3d 874, 876 (9th Cir. 1997). Defedant asks this Court to exercise its discretion to vacate in part the Transfer Order for three reasons: (1) the credibility finding was clearly erroneous; (2) Defendant claims new evidence contravenes the court's credibility finding; and (3) maintaining the findings is manifestly unjust. (Dkt. No. 97 at 13.)

However, because the issue here is not a legal decision, but rather reasoning and dicta, the law-of-the-case principles do not apply. Even if this Court were to apply the *Alexander* factors, there is no reason the revisit the Transfer Order. "The policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation." *Christianson*, 486 U.S. at 816. As discussed above, there is no compelling reason to revisit the Transfer Order. Thus, this case does not meet the high threshold outlined in *Christianson* and this Court should not revisit the Transfer Order.

CONCLUSION

For the reasons stated above, I recommend you DENY the motion to vacate in part.

Applicant Details

First Name	**Robert**
Middle Initial	**M.**
Last Name	**White**
Citizenship Status	**U. S. Citizen**
Email Address	**white.r23@law.wlu.edu**
Address	**Address** Street **84 Tuckaway Ridge** City **Lexington** State/Territory **Virginia** Zip **24450** Country **United States**
Contact Phone Number	**301-928-8550**

Applicant Education

BA/BS From	**Tulane University**
Date of BA/BS	**May 2015**
JD/LLB From	**Washington and Lee University School of Law** **http://www.law.wlu.edu**
Date of JD/LLB	**May 12, 2023**
Class Rank	**50%**
Law Review/Journal	**Yes**
Journal(s)	**German Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**John W. Davis Appellate Advocacy Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Appellate, Habeas, Immigration, Prison Litigation, Pro Se, Social Security**

Recommenders

Fraley, Jill
fraleyj@wlu.edu
Murchison, Brian
murchisonb@wlu.edu
540-458-8511
Klein, Alex
aklein@wlu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

84 Tuckaway Ridge
Lexington, Virginia 24450

March 27, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am a law student at Washington and Lee University, and I want to clerk for you during the 2024–2025 term. This would be my second clerkship and a natural step in my career as a public servant and litigator.

After I graduate, during the 2023–2024 term, I will clerk for the Hon. Diana Song Quiroga, Magistrate Judge, at the Southern District of Texas, Laredo Division. The Southern District has the busiest federal criminal docket in the United States, and Laredo is the busiest land port in Texas. Judge Song Quiroga has primary responsibility for pre-trial criminal matters there. I am assured that, after a year in her chambers, I will be expert in criminal procedure, especially relating to transnational organized crime and security. This may prove useful in your chambers: I could help with these cases confidently, straight away.

My experience on the border will complement my earlier work on public matters. These included counterintelligence, registration of foreign agents, global access to dangerous speech, and elections integrity. On campus, I organized student activities and speaker panels, for which the American Constitution Society named me a Next Generation Leader. I have gained some feeling for public responsibility and will gain more soon; I hope this prepares me to contribute from day one at the Eastern District of Virginia.

I intend to make my career practicing the most intricate law, on the weightiest questions, with the highest stakes. Your docket would expose me to this standard, and, for the rest of my career, I would hold myself to it. Please call me any time to discuss how I could be of service to you. Thank you for your consideration.

Yours faithfully,

Robert White

Enclosures

ROBERT WHITE

84 Tuckaway Ridge, Lexington, Virginia 24450 • (301) 928-8550 • white.r23@law.wlu.edu

EDUCATION

Washington and Lee University School of Law, Lexington, Virginia, 2023
Juris Doctor, GPA: 3.616

- Lead Articles Editor, German Law Journal
- Next Generation Leader, American Constitution Society, for service as chapter president
- Awardee, Baronial Order of Magna Charta Scholarship, for excellence in const. law
- Volunteer, Walker Program, gave legal assistance to local entrepreneurs
- Member, Selden Society, supporting study of English legal history

Tulane University, New Orleans, Louisiana, 2015
Bachelor of Arts, Political Economy (International Perspectives)
Bachelor of Arts, Spanish and Portuguese, with departmental honors
Minor, Latin American Studies

- *cum laude*, Distinguished Scholar, Dean's List
- Study abroad: Madrid, spring 2014; São Paulo, fall 2014
- Internship: Organization of American States, Washington, D.C., summer 2013

EXPERIENCE

U.S. District Court for the Southern District of Texas, Laredo, Texas, 2023–2024
Term Law Clerk, Chambers of The Honorable Diana Song Quiroga, Magistrate Judge

- For primary magistrate ruling on pre-trial matters, predominantly about transnational organized crime and border security, in nation's busiest federal criminal docket

Department of Justice, National Security Division, Washington, D.C., 2022–2023
Intern, Counterintelligence and Export Control Section

- Recommended inquiries under Foreign Agents Registration Act, collected evidence for espionage trial, and drafted memoranda on Classified Information Procedures Act

U.S. Attorney's Office for the District of Maryland, Baltimore, Maryland, summer 2022
Intern, Criminal and Civil Divisions

- Drafted habeas corpus answers, asset forfeiture memoranda, and civil trial motions

Federal Communications Commission, Washington, D.C., summer 2021
Intern, Public Safety and Homeland Security Bureau

- Drafted memoranda on net neutrality, cybersecurity, and sources of authority

U.S. District Court for the District of Maryland, Greenbelt, Maryland, summer 2021
Intern, Chambers of The Honorable Charles B. Day, Magistrate Judge

- Drafted opinions on Cruel and Unusual Punishment and Federal Tort Claims Act

CounterAction, Washington, D.C., 2019–2020
Consultant

- Collected open-source intelligence on disinformation in foreign elections and COVID-19

Nobody Media, Washington, D.C., 2018–2020
Associate Strategist

- Crafted and carried out social media strategy for national brands near public policy
- Reached 150,000 people daily, delivered 66 million paid impressions on FB+IG, and grew Twitter followership organically 150% for a leading public-history non-profit

Supreme Court Historical Society, Washington, D.C., 2017–2018
Publications and Outreach Assistant

- Wrote articles on Court events and constitutional history for Quarterly publication

GMMB+, Washington, D.C., 2016
Media Assistant

- Team placed advertisements for a major party's candidate for president; national, senatorial, and congressional campaign committees; governors's association; and PACs
- Tracked and summarized opponents's daily media spending on state and federal races

Print Date: 05/14/2023
Page: 1 of 3
Student: Robert MacCallum White

WASHINGTON AND LEE
UNIVERSITY
Lexington, Virginia 24450-2116

SSN: XXX-XX-2679 **Entry Date:** 08/17/2020
Date of Birth: 08/06/XXXX **Academic Level:** Law

2020-2021 Law Fall
08/17/2020 - 11/24/2020

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	A-	4.00	4.00	14.68	
LAW 140	CONTRACTS	A-	4.00	4.00	14.68	
LAW 163	LEGAL RESEARCH	A-	0.50	0.50	1.84	
LAW 165	LEGAL WRITING I	A-	2.00	2.00	7.34	
LAW 190	TORTS	B+	4.00	4.00	13.32	
	Term GPA: 3.576	**Totals:**	14.50	14.50	51.86	
	Cumulative GPA: 3.576	**Totals:**	14.50	14.50	51.86	

2020-2021 Law Spring
01/11/2021 - 04/27/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	A-	4.00	4.00	14.68	
LAW 150	CRIMINAL LAW	B+	3.00	3.00	9.99	
LAW 163	LEGAL RESEARCH	A-	0.50	0.50	1.84	
LAW 166	LEGAL WRITING II	B+	2.00	2.00	6.66	
LAW 179	PROPERTY	A-	4.00	4.00	14.68	
LAW 195	TRANSNATIONAL LAW	B+	3.00	3.00	9.99	
	Term GPA: 3.505	**Totals:**	16.50	16.50	57.84	
	Cumulative GPA: 3.538	**Totals:**	31.00	31.00	109.69	

2020-2021 Law Summer
05/16/2021 - 08/07/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 888	SUMMER INTERNSHIP	CR	1.00	1.00	0.00	
	Term GPA: 0.000	**Totals:**	1.00	1.00	0.00	
	Cumulative GPA: 3.538	**Totals:**	32.00	32.00	109.69	

Print Date: 05/14/2023
Page: 2 of 3
Student: Robert MacCallum White

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

2021-2022 Law Fall
08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 216	BUSINESS ASSOCIATIONS	B+	4.00	4.00	13.32	
LAW 237	COMPARATIVE CONST LAW SEMINAR	A-	2.00	2.00	7.34	
LAW 285	EVIDENCE	A	3.00	3.00	12.00	
LAW 300	FED JURISDICTION & PROCEDURE	P	3.00	3.00	0.00	
LAW 301	FOURTH AMENDMENT AND TECH SEM	A-	2.00	2.00	7.34	
LAW 365P	MERGERS & ACQUISIT ACTUAL PRAC	A-	2.00	2.00	7.34	
	Term GPA: 3.641	**Totals:**	16.00	16.00	47.34	
	Cumulative GPA: 3.568	**Totals:**	48.00	48.00	157.03	

2021-2022 Law Spring
01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 222	MASS MEDIA LAW	B+	2.00	2.00	6.66	
LAW 365P	MERGERS & ACQUISIT ACTUAL PRAC	A-	3.00	3.00	11.01	
LAW 390	PROFESSIONAL RESPONSIBILITY	A-	3.00	3.00	11.01	
LAW 410	SECURITIES REGULATION	P	3.00	3.00	0.00	
LAW 410X	SECURITIES REGULATION SKILLS	A-	1.00	1.00	3.67	
LAW 428P	TRIAL ADVOCACY PRACTICUM	A-	3.00	3.00	11.01	
	Term GPA: 3.613	**Totals:**	15.00	15.00	43.36	
	Cumulative GPA: 3.578	**Totals:**	63.00	63.00	200.39	

2021-2022 Law Summer
05/22/2022 - 08/13/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 888	SUMMER INTERNSHIP	CR	1.00	1.00	0.00	
	Term GPA: 0.000	**Totals:**	1.00	1.00	0.00	
	Cumulative GPA: 3.578	**Totals:**	64.00	64.00	200.39	

Print Date: 05/14/2023
Page: 3 of 3
Student: Robert MacCallum White

WASHINGTON AND LEE
UNIVERSITY
Lexington, Virginia 24450-2116

2022-2023 Law Fall
08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 707L	Skills Immersion: Litigation	P	2.00	2.00	0.00	
LAW 733	Criminal Procedure: Investigation	A	3.00	3.00	12.00	
LAW 739	Federal White Collar Crime	A	3.00	3.00	12.00	
LAW 817	Statutory Interpretation Practicum	A	4.00	4.00	16.00	
LAW 940	General Externship	B+	1.00	1.00	3.33	
LAW 940FP	General Externship: Field Placement	P	3.00	3.00	0.00	
LAW 969	German Law Journal	CR	1.00	1.00	0.00	
	Term GPA: 3.939	**Totals:**	17.00	17.00	43.33	
	Cumulative GPA: 3.637	**Totals:**	81.00	81.00	243.72	

2022-2023 Law Spring
01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 610	Independent Research	CR	1.00	1.00	0.00	
LAW 701	Administrative Law	B+	3.00	3.00	9.99	
LAW 731	Immigration Law	A-	3.00	3.00	11.01	
LAW 765	Criminal Procedure: Adjudication	B+	3.00	3.00	9.99	
LAW 793	Federal Income Tax of Individuals	A-	3.00	3.00	11.01	
LAW 969	German Law Journal	CR	1.00	1.00	0.00	
	Term GPA: 3.500	**Totals:**	14.00	14.00	42.00	
	Cumulative GPA: 3.616	**Totals:**	95.00	95.00	285.72	

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	95.00	95.00	3.616
External:	0.00	0.00	
Overall:	95.00	95.00	3.616

Program: Law

End of Official Transcript

WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.
The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.
The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

Official transcripts, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

Undergraduate

Degrees awarded: Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commence (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	4.33 prior to Fall 2009
A	4.00	Superior.
A-	3.67	
B+	3.33	
B	3.00	Good.
B-	2.67	
C+	2.33	
C	2.00	Fair.
C-	1.67	
D+	1.33	
D	1.00	Marginal.
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

Grade prefixes:

R Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).

E Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

Ungraded credit:

Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.

Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

Cumulative Adjustments:

Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

Dean's List: Full-time students with a fall or winter term GPA of at least 3.400 *and* a cumulative GPA of at least 2.000 *and* no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

Honor Roll: Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

University Scholars: This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

Law

Degrees awarded: Juris Doctor (JD) and Master of Laws (LLM)

Numerical Grade*	Letter Grade**	Points	Description
4.0	A	4.00	
	A-	3.67	
3.5		3.50	
	B+	3.33	
3.0	B	3.00	
	B-	2.67	
2.5		2.50	
	C+	2.33	
2.0	C	2.00	
	C-	1.67	
1.5		1.50	This grade eliminated after Class of 1990.
	D+	1.33	
1.0	D	1.00	A grade of D or higher in each required course is necessary for graduation.
	D-	0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5		0.50	This grade eliminated after the Class of 1990.
0.0	F	0.00	Receipt of D- or F in a required course mandates repeating the course.

Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.
** Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

Cumulative Adjustments:

Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

Course Numbering Update: Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar
Washington and Lee University
Lexington, Virginia 24450-2116
phone: 540.458.8455
email: registrar@wlu.edu

University Registrar

220707

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

March 30, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I have known Robert since he began at Washington and Lee. He was a member of my Constitutional Law course last year and I have continued to be an advisor for him. Overall, I can say that I know Robert quite well and can highly recommend him. He is smart, mature, an avid reader and thinker outside of law school, and a hard worker.

Robert came to law school with a number of professional experiences that prepared him well for the challenges of law school. He is an enthusiastic (but not overbearing) participant in class. In a semester that began with the January 6th events in D.C., you can imagine that Constitutional Law was polarizing for students. In that atmosphere, Robert was a breath of fresh air. He was thoughtful, respectful, genuine, and professional. He drew upon a wealth of historical knowledge to speak engagingly with his peers, drawing on facts and legal arguments more than opinion. I usually have to teach (and sometimes nearly beg) students to do that. As a result, I nominated Robert for an award for a Constitutional Law student from the Baronial Order of the Magna Carta. Robert won the award last year.

More personally, Robert is mature and very professional. He presents himself in a measured, thoughtful way. He thinks in terms of data, but approaches it with the viewpoint of a seasoned reader of history and law. He is very poised and gracious in speaking with others, particularly when opinions are divided. He is the type of person I think would make an excellent judge someday. In that way I belive that a clerkship experience would be particularly beneficial to him. Simultanously, he would be a valuable contributor to chambers.

Best Regards,

Jill M. Fraley
Professor of Law

Jill Fraley - fraleyj@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

March 30, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

This is to recommend one of my students, Robert White, who is applying for a clerkship in your chambers. In May, 2023, Mr. White will graduate from Washington and Lee University School of Law, where I have been a faculty member since 1982. In his second year of law school, Mr. White took my course in Mass Media Law, a survey of leading cases under the Speech and Press Clauses and various state and federal statutes. Since then, we have had numerous conversations outside of class about his course of study and professional goals. Based on these contacts, I have a good sense of his abilities and potential for success in a judicial clerkship.

Mr. White would be a truly outstanding clerk, and I recommend him enthusiastically. In my class, he exhibited that all-too-rare capacity to get to the very heart of a legal question without delay, articulating the precise issue and recognizing the various options that a court could consider in shaping and applying legal doctrine. I attribute this ability at least in part to the immense preparation that Mr. White clearly brought to every class. I could count on him in particular for analysis of how a particular case fit into the larger context of First Amendment case law and how some decisions reflected background values about the role of speech and press in a democracy such as ours.

I required each student in the class to deliver a formal re-argument for one of the parties in an assigned case. By luck of the draw, Mr. White argued the respondent's side in the classic case of Miami Herald Publishing Co. v. Tornillo. As I expected, he did a splendid job. He smartly focused on the factual context and legal precedent supporting the state right-to-reply statute in that case, superbly demonstrating why the case was as challenging as it was. In discussion after his argument, he carefully spoke to the relevance of Tornillo in current litigation concerning state laws regulating social media platforms. All in all, Mr. White set a very high standard indeed for such presentations.

I also recommend Mr. White simply as a person. He has a positive personality and a warm sense of humor. He interacts well with his professors and peers, and I am confident that he would bring a collaborative, collegial spirit to any professional environment.

For these reasons, I hope that you will give careful consideration to Mr. White's application. In my judgment, he has the intellect, drive, and maturity to succeed quite brilliantly in a judicial clerkship and later in the practice of law.

Sincerely,

Brian C. Murchison
Professor of Law

Brian Murchison - murchisonb@wlu.edu - 540-458-8511

March 30, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I strongly encourage you to consider Robert White for a judicial clerkship in your chambers. I've taught Robert in two classes, Criminal Law, and a seminar I teach that addresses the Fourth Amendment and Technology. Robert has been an enthusiastic and engaged student in both of these classes. At the time I taught Robert, I was employed at Washington & Lee Law as a Visiting Assistant Professor. Although I have since accepted a position as an Assistant Professor of Law at St. Mary's University, Robert and I are still in touch.

Criminal Law can be a challenging subject for first-year students, who may find the material—and lack of a singular bright-line rule frustrating. Robert was no exception, but he enjoyed the challenge of dealing with the complexities and gray areas of criminal law. Many first-year students are nervous about uncertainty. Robert perceived it as an opportunity to broaden his understanding. I particularly enjoyed his contributions to class discussions on justification and excuse defenses, during which he offered additional hypotheticals and thought experiments. His discussions added value to class discussion and his colleagues' understanding.

Robert is an extremely curious person. He's interested not only in understanding a particular legal rule, but also its origins and interpretive history. One day after a Criminal Law class, Robert approached me to discuss in significant detail, the judicial reasoning in a tricky case that drew narrow distinctions between complicity and conspiracy. We had a good discussion of the substantive issues and standards for judicial review in a greater depth than most first-year students want to undertake. I was impressed by his determination to understand the rule in the case as well as the analytic path—for him, the correct analytic path is just as important as the result. He demonstrated the same tenacity in the Fourth Amendment and Technology Seminar as he developed his seminar paper.

Students are required to write a paper about a topic at the intersection of the Fourth Amendment and technology. Robert opted to write his paper about the private search doctrine and the potential consequences of the doctrine as it applies to government-induced backdoors in commercially available encryption products. Robert's paper provided a thorough historical analysis of the origins of the private search doctrine, arguing that Burdeau v. McDowell failed to give sufficient weight to earlier precedent. It was a challenging topic, necessitating significant historic research. Robert's paper demonstrated excellent assessment of the precedent underlying Burdeau and impressive research depth. His paper opened with a compelling discussion of the complicated facts underlying internet encryption and the NSA's potential use of backdoor access to commercially available software. The paper was well-written, organized, and a pleasure to read.

Robert was genuinely excited to write the paper—his footnotes confirm the sincerity of his interest in legal writing and research. While he wanted to engage in a deeper historical dive, he independently recognized that it was outside the limits of the assignment and accepted and incorporated feedback appropriately and professionally to adjust his paper. He's able to balance his own personal curiosity against wandering too far afield. Based on his work in my class, Robert would thrive in positions that involve careful tracing of legislative history and judicial interpretation.

Robert demonstrated real skill in providing feedback as well as receiving it. Seminar students are required to review another student's in-progress draft and offer substantive feedback. Robert excelled in the peer review assignment. He offered constructive suggestions that strengthened his colleague's arguments as well as the organization and structure of the paper. Several of the suggestions he noted were issues I had spotted in my own review of the draft. Robert's feedback was also professionally worded and courteous. Robert also did something that few of his other colleagues did—he indicated places where his colleague had done an especially good job framing an argument or concept. Robert's colleague appreciated the care and thought he put into proofing, as well as his collaborative approach.

Robert is also determined to contribute to the wellbeing of his community. Washington & Lee Law School's building has many large glass windows that are a hazard for birds—birds fly into the glass and are injured or sometimes killed. Robert, an avid birdwatcher, has been working to convince the law school to implement steps to protect local birds. It may seem like a minor issue, but Robert's determination to do something about a problem that he thinks is unaddressed reflects his broader personal values.

I appreciate Robert's thoughtfulness about who he will be as a member of the legal profession. We've had regular out-of-class conversations about the role a lawyer should play in the legal system as well as in sustaining and building a more just world. I find his frustration with injustice and his insistence that lawyers should not forget the importance of all struggles—poverty, education, and employment as part of their duties of advocacy inspiring and encouraging for the future of the legal profession.

It's been a pleasure to teach Robert and I'm excited to watch his professional development. I was delighted to hear that he had

Alex Klein - aklein@wlu.edu

accepted a clerkship with a federal magistrate judge for the 2022–2023 term— He will make an excellent law clerk. If there is any additional information I can provide about Robert's qualifications, please do not hesitate to contact me at aklein1@stmarytx.edu or at 210-431-8056.

Sincerely,

Alexandra Klein
Assistant Professor of Law
St. Mary's University School of Law
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ROBERT WHITE

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WRITING SAMPLE

This summer, I interned at the United States Attorney's Office for the District of Maryland. While I was there, a man serving life for production of child pornography made a habeas corpus motion, and I was assigned the response. The man styled his motion, "Petition for Writ of Habeas Corpus Under: 28 U.S.C. § 2241, via the Savings Clause Under § 2255(e)." No one at the Office knew what this meant, and I was given a long leash to figure it out.

I needed the long leash. The record was cluttered with unreliable testimony, tampered-with evidence, imprecise argument, informal findings of fact, and an ambiguous procedural history. Moreover, the law of the case was a moving target. First, the Supreme Court decided *Brown v. Davenport*, 142 S. Ct. 1510 (2022), which breathed new life into some equitable and prudential precedents from before the Antiterrorism and Effective Death Penalty Act of 1996. Then, the Court granted certiorari in *Jones v. Hendrix*, 8 F.4th 683 (8th Cir. 2021), and the Solicitor General notified the Court that the government would not defend the rationale of the decision below. This put new rules and actual innocence in the spotlight, and I had to invoke *Brown* without upsetting the Department's position in *Jones*.

In the end, the Office filed my response without substantive edits; my supervisor changed a few dozen words at the most. This sample contains my discussion of the savings clause.

Petitioner's Motion, construed at § 2255, cannot overcome AEDPA's procedural bars at 28 U.S.C. § 2255(f), (h)(2). *See infra* pp. 46–53. The Motion must be construed at § 2255 because Petitioner cannot pass through the savings clause at § 2255(e).

C. Section 2255 Is Not Inadequate or Ineffective, So Petitioner Cannot Evade AEDPA's Procedural Bars

A petitioner authorized to use § 2255 cannot make a collateral attack at another section unless § 2255 is "inadequate or ineffective to test the legality of his detention." § 2255(e) ("savings clause"). Where this is the case, a petitioner may use 28 U.S.C. § 2241, an older section enacted in 1867. *See Hayman*, 342 U.S. at 223. This avoids constitutional problems that would arise if, for example, the petitioner were to lack an adequate opportunity to present his claims fairly. *See United States v. MacCollom*, 426 U.S. 317 (1976) (discussing in various opinions *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)); *Swain v. Pressley*, 430 U.S. 372, 381–83 (1977). To proceed at § 2241, a petitioner must establish inadequacy or ineffectiveness at § 2255. *Farkas v. Butner*, 972 F.3d 548, 553 (4th Cir. 2020). The savings clause is jurisdictional. *See supra* note 9.

The Fourth Circuit first considered the savings clause in *In re Jones*, 226 F.3d 328 (4th Cir. 2000). There, Jones was convicted of using a firearm while trafficking drugs. 226 F.3d at 330. Although Jones had not carried the firearm, constructive possession was sufficient to establish "use" under the Circuit's precedents, and his insufficiency argument failed on direct appeal. *Id.* at 330, 334 n.4. His collateral attack at § 2255 also failed. *Id.* at 330. Later that year, the Supreme Court overruled the Circuit's "use" precedents, *Bailey v. United States*, 516 U.S. 137 (1995), and required the government to prove active employment of the firearm. 226 F.3d at 330. Shortly thereafter, Congress enacted AEDPA. *Id.* Jones moved the Fourth Circuit for authorization to file a second or successive § 2255 motion on a theory that *Bailey* had announced a new rule, but the court of appeals denied the motion because the new rule was not one of constitutional law and had

not been made retroactive by the Supreme Court. *Id.* Shortly thereafter, the Supreme Court decided *Bousley*, 523 U.S. 614, making *Bailey* retroactive to cases on collateral review. 226 F.3d at 330. Again, Jones moved for authorization to file a second or successive § 2255 motion. *Id.* Again, the court denied the motion. *Id.* Jones moved for authorization a third time, now arguing in the alternative that § 2241 should be available to him because § 2255 was inadequate or ineffective to test the legality of his detention. *Id.* at 331.

The Fourth Circuit agreed. Although § 2255 "is not inadequate or ineffective merely because an individual is unable to obtain relief under that provision," *id.* at 333 (citing *inter alia In re Vial*, 115 F.3d at 1194 n.5), the court reasoned that the savings clause could not be meaningless. *Id.* The court approved the holdings of her sister circuits, which, at the time, uniformly found inadequacy or ineffectiveness where "an individual is incarcerated for conduct that is not criminal but, through no fault of his own, has no source of redress." *Id.* at 333 & n.3. The court announced that § 2255 is inadequate or ineffective where,

> (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

Id. at 333–34. Applying this test to Jones, the court observed that he was "incarcerated for conduct that is not criminal" under *Bailey*, which "was decided after Jones' appeal and after the decision on his first § 2255 motion." *Id.* at 334. The court held § 2255 inadequate or ineffective to test the legality of his detention. *Id.*

The Fourth Circuit revisits and approves *Jones* from time to time. *Rice v. Rivera*, 617 F.3d 802 (4th Cir. 2010) (per curiam) (failing *Jones* second prong); *United States v. Surratt*, 797 F.3d 240 (4th Cir. 2015) (failing *Jones* second prong without expressly approving test, rather approving

Jones as matter of constitutional avoidance for cases of actual innocence), *appeal dismissed as moot en banc*, 855 F.3d 218, *and abrogated by Hahn v. Moseley*, 931 F.3d 295, 302–07 (4th Cir. 2019) (passing *Jones*, with unanimous panel and concurrence explaining, "[T]he Fourth Circuit does not require an actual innocence analysis under the savings clause . . ."); *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018) (modifying second and third *Jones* prongs and adding fourth prong in challenge to sentence but not conviction);[10] *Lester v. Flournoy*, 909 F.3d 708 (4th Cir. 2018) (passing *Wheeler*); *Braswell v. Smith*, 952 F.3d 441 (4th Cir. 2020) (passing *Wheeler* and clarifying at second prong, "[T]he *combination* of the change in settled substantive law and its retroactivity must occur after the first § 2255 motion has been resolved," 952 F.3d at 448); *Farkas v. Butner*, 972 F.3d 548 (4th Cir. 2020) (failing second and third *Jones* prongs and declining to apply *Wheeler* in challenge to conviction); *Young v. Antonelli*, 982 F.3d 914 (4th Cir. 2020) (making new rule retroactive to pass *Wheeler* second prong); *Ham v. Breckon*, 994 F.3d 682 (4th Cir. 2021) (failing *Wheeler* second prong); *Marlowe v. Warden, FCI Hazelton*, 6 F.4th 562 (4th Cir. 2021) (failing *Jones* first prong). These cases place importance on the petitioner's opportunity to take advantage of a new rule, allowing him to proceed at § 2241 only where § 2255 itself, and not some procedural failing on the petitioner's part, would otherwise be the petitioner's only obstacle to invoking the rule. *See Marlowe*, 6 F.4th at 570–72; *Braswell*, 952 F.3d at 447–51;

[10] *Wheeler* announced a test for sentences similar to the *Jones* test for convictions:

> (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

886 F.3d at 429. Because Petitioner invokes *Palomino–Coronado* to challenge his convictions rather than his sentences, *Jones* controls this case, and *Wheeler* has no direct application. *See Farkas*, 972 F.3d at 559–60. But insofar as they develop the principles on which *Jones* was announced, *Wheeler* and its progeny might inform an application of *Jones*.

Rice, 617 F.3d at 807. *But see Wheeler*, 886 F.3d at 430 (declining to give controlling weight to argument previously disposed of and later vindicated by new rule (quoting *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) ("[T]he privilege of habeas corpus entitles the prisoner to a *meaningful* opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." (emphasis supplied and internal quotation marks omitted in *Wheeler*)))). The Fourth Circuit polices § 2241 rigorously. *See Farkas*, 972 F.3d at 560 ("*Wheeler* and *Jones* are not guideposts marking a broad path yet to be cut—each is a narrow, well-delineated trail by which certain petitioners may pursue appropriate relief.").[11]

Here, § 2255 is not inadequate or ineffective to test the legality of Petitioner's detention because, needing to satisfy each prong of *Jones*, Petitioner fails each.

1. Prong One: "At the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; . . . ."

The Fourth Circuit squarely interpreted the first prong of *Jones* in *Marlowe v. Warden, FCI Hazelton*, 6 F.4th 562 (4th Cir. 2021). In 2003, Marlowe supervised correctional officers and, in a heinous deprivation of federal rights at 18 U.S.C. § 242, oversaw the killing of a detainee. 6 F.4th

[11] On May 16, 2022, the Supreme Court granted certiorari in *Jones v. Hendrix*, 8 F.4th 683 (8th Cir. 2021). No. 21-857. The issue there is whether a circuit, like the Eighth Circuit, may refuse to provide a test of inadequacy or ineffectiveness at § 2255(e), like the Fourth Circuit provided in *In re Jones*, 226 F.3d at 333–34, to a petitioner who failed at his earlier proceedings to raise an argument, later vindicated by a new rule, that circuit precedent would have made futile to raise at the time. On June 17, 2022, the Solicitor General notified the Court that the government would not defend the rationale of the decision below. Letter from Elizabeth B. Prelogar, Solicitor General, to the Hon. Scott S. Harris, Clerk, Supreme Court. On August 8, 2022, the Solicitor General filed a Brief for Respondent (No. 21-857). The position of the Department of Justice is,

> a federal prisoner who is barred from filing a second Section 2255 motion under Section 2255(h) may invoke the saving clause and seek habeas relief if he (1) contends that a new statutory interpretation decision of this Court establishes that his conduct was not criminal, and (2) establishes that he is actually innocent in light of the narrowed definition of the offense—that is, that no reasonable juror would vote to find him guilty in light of all available evidence.

Brief for Respondent. Here, Petitioner would fail the Department's test because, in addition to being barred at § 2255(h), his Motion is time-barred at § 2255(f), because no new statutory interpretation of the Supreme Court makes Petitioner's conduct not criminal, and because Petitioner cannot establish his actual innocence. The Supreme Court has scheduled oral argument in *Jones v. Hendrix*, No. 21-857, for November 1, 2022.

at 565–66. Instructed that the government needed only prove that bodily injury or death was "a natural and foreseeable result" of Marlowe's conduct, the jury convicted him, and the trial court sentenced him to life imprisonment. *Id.* at 566–67. His direct appeal and first collateral attack failed, and he invoked the savings clause to make another attack. *Id.* at 567. Now, he claimed that the Supreme Court's decision in *Burrage v. United States*, 571 U.S. 204 (2014) (requiring but-for causation where death or serious bodily harm triggers mandatory minimum sentence under drug statute), which the Sixth Circuit had made retroactive to cases on collateral review,[12] invalidated his jury instructions. *Id.* The district court dismissed Marlowe's application, and he appealed to the Fourth Circuit. *Id.* at 567–68.

The Fourth Circuit placed importance on the fact that "no binding precedent" had previously foreclosed Marlowe's new causation argument. *Id.* at 568. The court observed,

> The law was settled and adverse to the prisoners in *Jones* and the cases on which it relied because, at the time of their convictions, binding precedent foreclosed the statutory interpretation they later claimed undercut the legality of their convictions. . . . *Jones* is thus premised on the understanding that binding precedent previously prevented the prisoner from asserting the argument he later claims a change in the law has made available to him.

Id. at 570. The court reviewed *Jones* and its progeny and identified a consistent focus on whether settled law previously foreclosed an argument "such that raising it earlier was or would have been futile." *Id.* at 570–71. The court further observed that "[p]rinciples of procedural default sharply limit" collateral review of an argument that a petitioner "could have made, but did not," at trial or on direct appeal. *Id.* at 571. "The exclusion of previously available claims from Section 2255's

[12] Marlowe was convicted in the Middle District of Tennessee but was serving his sentence in the Northern District of West Virginia, and his § 2241 motion was properly made where he was restrained. 6 F.4th at 567 n.2. The Fourth Circuit applied *Jones* as its own procedural law and, in deciding whether settled law established the legality of the conviction, applied the Sixth Circuit's substantive law. 6 F.4th at 572. This jurisdictional feature of § 2241 was a primary reason for which Congress enacted § 2255, at which motions are made in the sentencing court. § 2255(a); *see Hayman*, 342 U.S. at 214 n.18. Here, Petitioner was convicted in and is serving his sentence in the District of Maryland, so the point is only academic.

reach compels a similar approach to the savings clause," at least where a petitioner could have asserted "an argument on an unsettled point of law" at an earlier proceeding. *Id.* at 571–72. The court held that, to satisfy the first prong of *Jones*, "a prisoner must show that binding precedent foreclosed the argument he later presses to collaterally attack his conviction." *Id.* at 573.

Marlowe, attempting to show that *Burrage* changed settled Sixth Circuit law under which he was convicted, pointed to a 2009 Sixth Circuit case, about an unrelated statute, that discussed a 1994 Sixth Circuit case, about an unrelated statute, that, in upholding a "natural and foreseeable result" instruction, cited approvingly a 1979 Fifth Circuit case about § 242. *Id.* at 572. The Fourth Circuit did not accept that these cases foreclosed Marlowe's causation argument before his conviction became final. *Id.* at 572–73. Moreover, the 2009 case stated that the Sixth Circuit never interpreted the "results" language at § 242, so the law "could hardly be 'settled,'" and the 1994 case was unpublished. *Id.* "A nonprecedential decision interpreting a different statute cannot establish 'settled law.'" *Id.* at 573 (citing *Ham*, 994 F.3d at 693). Because Marlowe had not shown that binding Sixth Circuit precedent would have made it futile to raise his causation objection at trial, he failed the first prong of *Jones*. *Id.*

Here, Petitioner cannot show that binding precedent foreclosed his purpose argument at his trial, direct appeal, or first collateral attack. The argument was there to be made, and, in fact, he made it at each proceeding. Trial Tr. at 130–32 (Apr. 22, 2011); Trial Tr. at 51–52, 88–89, 103–04 (May 6, 2011); Br. Appellant 38–46, *United States v. Davison*, 492 F. App'x 391 (4th Cir. Jan. 6, 2012) (No. 11-4778), ECF No. 26; Reply Br. Appellant, 492 F. App'x 391 (May 1, 2012) (No. 11-4778), ECF No. 47; Mot. Vacate (March 13, 2014), ECF No. 175. Absent from these arguments was any mention of binding Fourth Circuit precedent. Rather, the parties relied on the plain meaning of the statute, Congress's intent in enacting it, the language of the model jury

instructions, and one case examining another child exploitation statute, *United States v. Sirois*, 87 F.3d 34 (2d Cir. 1996). *E.g.*, Trial Tr. at 130–32 (Apr. 22, 2011); Government's Resp. Def.'s Rule 29 Mot. 4, ECF No. 102.[13] Of course, as a Second Circuit case, *Sirois* could not have settled the law of the District of Maryland or Fourth Circuit. *See, e.g.*, *McBurney v. Young*, 667 F.3d 454, 465 (4th Cir. 2012), *aff'd*, 569 U.S. 221 (2013). Moreover, Petitioner raised *Sirois* in support of his own argument. Trial Tr. at 132 (Apr. 22, 2011). *Palomino–Coronado*, 805 F.3d 127, on which Petitioner now relies, did not disapprove the standard that *Sirois* announced. And *Palomino–Coronado* and *McCauley* cited *Sirois* approvingly. 805 F.3d at 131, 132; 983 F.3d at 696, 697. Whatever it stood for at his earlier proceedings, *Sirois* did not prevent Petitioner from raising the argument that he now relies on *Palomino–Coronado* to raise. Petitioner offers no authority, and the government is aware of none, that could have been considered binding precedent foreclosing Petitioner's purpose argument at the earlier proceedings. The record of argument on this issue, bearing no hint of binding precedent, suggests that the argument was not foreclosed by binding precedent or anything else. Finally, the argument's failure at the earlier proceedings does not mean that raising it was futile. *See Marlowe*, 6 F.4th at 570. To the contrary, the subsequent clarifications in *Palomino–Coronado* and *McCauley* indicate that the meaning of "purpose" at 18 U.S.C. § 2251(a) was previously unsettled and open to argument. In 2015, the *Palomino–*

[13] The parties also relied on *United States v. Broxmeyer*, 616 F.3d 120 (2d Cir. 2010), and *United States v. Starr*, 533 F.3d 985 (8th Cir. 2008). *See* Trial Tr. at 132 (Apr. 22, 2011); Government's Resp. Def.'s Rule 29 Mot. 4, ECF No. 102; Br. Appellant 38–46, *United States v. Davison*, 492 F. App'x 391 (4th Cir. Jan. 6, 2012) (No. 11-4778), ECF No. 26; Br. Appellee 52–54, 492 F. App'x 391 (Apr. 2, 2012) (No. 11-4778), ECF No. 39; Reply Br. Appellant, 492 F. App'x 391 (May 1, 2012) (No. 11-4778), ECF No. 47. But these are cases about showing a defendant's *causation* of the production or transmission of images, not about showing his *purpose* in causing the sexual abuse or in producing images of it. Here, Petitioner's causation argument related to the fact that C.W. held the phone camera when some of the images were created, whereas Petitioner's purpose argument related to whether the conspirators abused C.W. for the purpose of producing images. *See* Trial Tr. at 130–32 (Apr. 22, 2011). These were distinct issues, and *Palomino–Coronado* and *McCauley*, on which Petitioner now relies, touched only the purpose issue. Even if the Court were to find causation relevant to purpose, *Broxmeyer* and *Starr*, as Second and Eighth Circuit cases not binding on the District of Maryland or the Fourth Circuit, could hardly have foreclosed any argument to Petitioner as a matter of settled law before his convictions became final. *See Marlowe*, 6 F.4th at 572–73.